1999

Cherise Roundy Black v. Craig Barney : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHERISE ROUNDY (BARNEY) BLACK, Petitioner/Appellee/ Cross Appellant, vs. V. CRAIG BARNEY Respondent/Appellant/ Cross Appellee.	**BRIEF OF APPELLANT** Case No. 990535CA

APPEAL FROM THE DIVORCE DECREE ENTERED ON JUNE 8, 1999, BY THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY, STATE OF UTAH, JUDGE STANTON M. TAYLOR PRESIDING

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CHERISE ROUNDY (BARNEY) BLACK,	:	
	:	
Petitioner/Appellee/	:	**BRIEF OF APPELLANT**
Cross Appellant,	:	
	:	
vs.	:	
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V. CRAIG BARNEY	:	
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JURISDICTION

The Utah Court of Appeals has jurisdiction to decide this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(h)(1996).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in awarding Ms. Black alimony that was nonterminable, even upon her remarriage? The standard of appellate review is an abuse of discretion. See Johnson v. Johnson, 855 P.2d 250, 251-252 (Utah Ct. App 1993). Mr. Barney preserved this issue in the trial court. R. 566.

2. Did the trial court abuse its discretion in awarding child support to Ms. Black in the amount of $2,220.00 by extrapolation of the statutory child support table? The standard of appellate review is an abuse of discretion. See Ball v. Peterson, 912 P.2d 1006, 1009 (Utah Ct. App 1996). Mr. Barney preserved this issue in the trial court. R. 996, pp. 40-42.

3. Did the trial court abuse its discretion in awarding judgment in favor of Ms. Black in the amount of: (i) $8,000.00 representing one-half of the value of the duplex real property awarded to Mr. Barney; and (ii) $20,000.00 representing one half of the value of the dental practice awarded to Mr. Barney. The standard of appellate review is an abuse of discretion. See Hall v. Hall, 858 P.2d 1018, 1021 (Utah Ct. App 1993). Mr. Barney preserved this issue in the trial court. R. 995, pp. 56-8 and R. 996, pp. 55-60.

DETERMINATIVE STATUTES

1. Relative to the nonterminable alimony issue, Utah Code Ann. § 30-3-5(8) (1999) is determinative, which provides, in relevant part:

> (8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. . . .

2. Relative to the child support issue, Utah Code Ann. § 78-45-7.12 (1999) is determinative, which provides:

> If the combined adjusted gross income exceeds the highest level specified in the table, an appropriate and just child support amount shall be ordered on a case-by-case basis, but the amount ordered may not be less than the highest level specified in the table for the number of children due support.

3. Relative to the judgment issue, Utah Code Ann. § 30-3-5(1) (1999) is determinative, which provides, in relevant part:

> When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. . . .

STATEMENT OF THE CASE

A. Course of Proceedings.

This is a divorce action. On March 26, 1997, Ms. Black filed her Complaint for divorce. R. 1-12.

On August 8, 1997, the trial court entered an Order on Order to Show Cause setting temporary terms during the pendency of the action relative to a hearing before Commissioner David S. Dillon

held on June 5, 1997. R. 148-53. Each party filed objections to the recommendations of the Commissioner. R. 114-22. On November 3, 1997, the trial court conducted a hearing on the objections and overruled the objections. R. 268-71.

On November 25, 1997, the trial court entered a Judgment and Decree of Divorce, whereby the parties were divorced and all other issues were reserved. R. 214-7.

On April 14, 1998, the trial court entered an Order on Order to Show Cause relative to a hearing before Commissioner Scott M. Hadley held on December 10, 1997. R. 284-91. In the Order on Order to Show Cause, among other items, (i) judgment was entered against Mr. Barney in the amount of $11,882.26 in favor of Ms. Black for alimony arrearages less certain offsets, (ii) Mr. Barney was found not to be in contempt for his failure to pay the temporary alimony amounts for the reasons that he did not have the ability to pay the amounts he was ordered to pay and that Mr. Barney had not been financially irresponsible since the time of the hearing setting temporary alimony; (iii) the trial court reserved the issue of whether Ms. Black had interfered with Mr. Barney's physical and telephone visitation until an evidentiary hearing could be held; and (iv) Ms. Black was found in contempt for her failure to seek or secure employment as ordered at the time of the hearing setting temporary alimony on June 5, 1997.

On October 22, 1998, the trial court entered its Findings, Recommendation and Order relative to Mr. Barney's Motion for

Citation of Contempt and Other Relief which was heard by Commissioner Scott M. Hadley on May 18, 1998. R. 503-14. In the Findings, Recommendation and Order, the trial court, among other things, (i) found Ms. Black in contempt for her failure to seek employment or to keep and provide a log of her attempts to secure employment; (ii) found Ms. Black to not be in contempt as to visitation interference but did find that she had violated the order of the trial court relative to the visitation that had been ordered; (iii) found Ms. Black in contempt for involving the children in the financial issues between the parties, and (iv) awarded Mr. Barney his attorney fees as a sanction against Ms. Black.

On October 23, 1998, Mr. Barney filed a Motion in Limine to Exclude Certain Testimony. R. 517-25. The Motion was filed to exclude any testimony which Ms. Black might attempt to illicit from any expert or other witness at trial on the value of Mr. Barney's dental practice which included goodwill as an element. Over objection, the trial court received evidence regarding the alleged goodwill present in Mr. Barney's dental practice. R. 994, pp. 234-97.

Trial was conducted on October 27 and 29, 1998. R. 526-27. After considering the closing arguments of counsel, the trial court ruled on the issues before it. R. 526-7 and R. 995, pp. 1-67. As a part of that ruling, the trial court held that alimony would terminate on the statutory events. R. 527 and R. 995, p. 54. At

the conclusion of the ruling, Ms. Black requested the trial court to consider the potential of awarding nonterminable alimony. R. 995, p. 61. The trial court reversed its prior ruling, reserved the issue of nonterminable alimony and requested the parties to file post-trial briefs on the issue. R. 995, pp. 61-3. On February 1, 1999, the trial court issued its Memorandum Decision on the issue of nonterminable alimony and granted the same to Ms. Black. R. 704-7.

Mr. Barney filed objections to the form of the Findings of Fact and Conclusions of Law prepared by counsel for Ms. Black. R. 760-803. On March 15, 1999, the trial court heard argument on the objections. R. 810 and R. 996, pp. 1-76. On June 8, 1999, the trial court entered its Findings of Fact and Conclusions of Law (R. 832-66) and its Divorce Decree (R. 813a-831). The Findings of Fact and Conclusions of Law and Decree of Divorce are included as Exhibits A and B, respectively, of the Addendum.

On June 15, 1999, Mr. Barney filed his Notice of Appeal. R. 867-9.

Ms. Black remarried on May 15, 1999. R. 889.

B. Statement of Facts.

Marriage and Children

Mr. Barney and Ms. Black married on June 6, 1974, and divorced on November 16, 1997, a marriage of over 23 years. R. 833. The parties have five children born as issue of the marriage, three of whom were minors at the time of the divorce. R. 2.

Education and Employment of the Parties

Mr. Barney completed three years of his bachelor's degree and Ms. Black attended some college prior to their marriage. After their marriage in June 1974, Mr. Barney was accepted to dental school beginning with the 1974-1975 school year. Mr. Barney's first year of dental school was accepted as credit for the fourth year of his bachelor's degree and he was awarded his bachelor of science degree in 1975. Mr. Barney's dental schooling was paid for by the United States Air Force through a health professional scholarship, which included the payment of books, tuition, fees and a $400.00 per month stipend. Both parties worked part-time jobs during the dental schooling to supplement their income. Mr. Barney was awarded his dental degree in 1978. Mr. Barney pursued advanced training and was awarded a certificate in periodontics in 1984. R. 841-2.

At the time the parties began having children, the parties agreed that Ms. Black would stay at home to care for the children and the household. Ms. Black did not pursue additional education or seek employment during the marriage although she worked sporadically in Mr. Barney's dental practice substituting for regular office employees and as a dental assistance as occasion required. Ms. Black also assisted Mr. Barney in setting up and decorating his office. R. 842-3.

Mr. Barney continues to practice as a periodontist in Bozeman, Montana, earning an average of $13,500.00 per month after business

expenses but before the payment of personal income and other employment taxes. R. 850.

At the time of trial, Ms. Black was living in Ogden, Utah, and was enrolled in college. R. 850. Ms. Black moved to St. George, Utah, in July 1999, and is apparently neither enrolled in school nor employed. R. 934. Ms. Black suffers from no disability preventing her from working. R. 993, pp. 66-70. During the pendency of the action before the trial court, Ms. Black was twice held in contempt for not securing employment. R. 284-91 and R. 503-14.

Inheritance

During the course of the marriage, Ms. Black received an inheritance in the amount of $125,000.00 paid in several installments from 1988 to 1996. All of the money was commingled with the parties' marital assets and/or used to pay marital expenses. R. 839-40.

Lifestyle and Financial Irresponsibility of the Parties During the Marriage

During the first years of the marriage, while Mr. Barney was attending dental school, the parties enjoyed, as he describes it, a "macaroni and cheese and hot dog lifestyle." After dental school, Mr. Barney served in the United States Air Force for 13 years and enjoyed a "middle or upper middle class lifestyle" earning a maximum of $50,000.00 per year. After leaving the military and entering into private practice and while living in

Bozeman, Montana, and Ogden, Utah, the parties lived "high off the hog" and a "more lavish lifestyle than what was affordable." Both parties testified that they had been fiscally irresponsible during the last four or five years of the marriage. R. 132-9. Both the domestic relations commissioner and the trial court judge found the same. R. 149 and R. 995, pp. 41-42. The trial court found that the parties lived an "extravagant and expensive lifestyle" and that the lifestyle could not be maintained after divorce. R. 850-2.

Divorce Decree

In the Divorce Decree, the trial court, among other things, ordered the following:

The parties were awarded joint legal custody of the three minor children with Ms. Black being awarded primary physical custody and Mr. Barney being awarded reasonable rights of visitation. R. 813-7.

Ms. Black was awarded child support in the amount of $2,220.00 per month based on an extrapolation of the statutory child support table. R. 821-2. The parties were ordered to equally pay the out-of-pocket medical and dental costs incurred for the benefit of the minor children. R. 817.

Ms. Black was awarded alimony in the amount of $2,000.00 per month for five years from the date of trial and $3,000.00 per month thereafter. R. 822-3. The trial court did not make a specific finding on Ms. Black's reasonable financial needs other than to state that her need, based on the extravagant lifestyle the parties

attempted to live during the last few years of the marriage, was greater than Mr. Barney's ability to pay. R. 850.

In the event Ms. Black remarried or cohabited at any time within five years from the date of trial, alimony would be reduced to $1,500.00 per month and increased to $2,000.00 per month thereafter. This alimony would not terminate on remarriage. R. 823. The trial court held all alimony would terminate on the death of either party or after 23 ½ years from the time of divorce. R. 824.

The parties equitably divided their personal property including furniture, furnishings and vehicles. R. 817. Mr. Barney was awarded his dental practice at a total value of $40,000.00. R. 818. Ms. Black was awarded the marital residence at a value of $24,455.00 and Mr. Barney was awarded a duplex at a value of $16,000.00. R. 818-9 and 837-8. Both real properties have been lost by the parties to foreclosure. Each party was awarded one half of an IRA with a total value of approximately $3,600.00. R. 819.

Mr. Barney was ordered to pay the federal and state income taxes, penalties and interest owing to the Internal Revenue Service and the State of Wyoming in the amount of $75,483.00. R. 819-20.

Ms. Black was awarded attorney fees and costs through the time of trial in the amount of $15,655.62. R. 824-5. The trial court denied Ms. Black's motion to be awarded additional post-trial attorney fees and costs in the amount of $15,892.00. R. 825.

The Court awarded Ms. Black a judgment against Mr. Barney for the following amounts:

$11,882.26	Judgment for temporary alimony
-4,759.05	Offsets awarded Mr. Barney
5,562.44	Contingent amounts awarded to Ms. Black in the event the marital residence was not lost to foreclosure
8,000.00	One-half of the value of the duplex property awarded to Mr. Barney
20,000.00	One half of the value of the dental practice awarded to Mr. Barney
15,655.62	Attorney fees and costs awarded to Ms. Black
$56,341.27	Total judgment amount

R. 825-30. In that the marital residence was lost to foreclosure, the $5,562.44 amount is no longer a part of the judgment.

Bankruptcy

Mr. Barney continues to attempt to work through his financial difficulties in an effort to avoid having to file for bankruptcy. Ms. Black filed a chapter 7 bankruptcy at approximately the time the divorce action was initially commenced. R. 821. On July 1, 1999, Ms. Black filed a second bankruptcy under chapter 13 primarily in order to eliminate the attorney fees owed to her trial counsel, Steve S. Christensen. R. 933. Mr. Christensen filed a claim in the bankruptcy and Ms. Black objected to the claim. The judge in the bankruptcy case reduced Mr. Christensen's claim to $5,000.00. That order has not yet been entered by the bankruptcy

court and will undoubtedly be appealed by Mr. Christensen. The trial court in this divorce action may have to re-visit the issue of the award of attorney fees once an order is entered by the bankruptcy court.

SUMMARY OF ARGUMENTS

The trial court abused its discretion by awarding Ms. Black nonterminable alimony. Mr. Barney does not appeal the award of alimony or the amount of the alimony awarded. None of the trial court's findings regarding nonterminable alimony provide a factual or legal basis for the award. Accordingly, alimony should have terminated on the remarriage of Ms. Black.

The trial court abused its discretion in the amount of child support awarded to Ms. Black. At trial, evidence must be introduced to establish the reasonable needs of the children before the trial court can award child support greater than the highest table amount. The trial court entered only conclusory findings regarding the needs of the children. In addition, although required under Utah case law, the trial court did not use linear extrapolation to calculate the amount of child support awarded. Accordingly, child support should be awarded at the highest statutory table amount.

The trial court abused its discretion by awarding Ms. Black judgments in favor of Ms. Black in the amounts of: (i) $8,000.00 representing one-half of the value of the duplex real property awarded to Mr. Barney; and (ii) $20,000.00 representing one-half of

the value of the dental practice awarded to Mr. Barney. These judgments were awarded based on factors which cannot be legally supported. Accordingly, the judgment amounts should be vacated.

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING MS. BLACK NONTERMINABLE ALIMONY

The trial court abused its discretion by awarding Ms. Black nonterminable alimony, that is alimony that continues despite her remarriage. Mr. Barney does not appeal the award of alimony or the amount of alimony awarded. Rather, Mr. Barney appeals the trial court's order that alimony survives Ms. Black's remarriage, which occurred on May 15, 1999.

The presumption that alimony terminates upon the remarriage of the recipient spouse is firmly rooted in Utah law and common sense. Utah Code Ann. § 30-3-5(8) provides, in relevant part:

> Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse.

Utah Code Ann. § 30-3-5(8)(1999). In fact, the issue of nonterminable alimony has been before this Court previously in Johnson v. Johnson, 855 P.2d 250 (Utah Ct. App 1993). In Johnson, this Court considered the issue of nonterminable alimony under facts and circumstances very similar to those present in this case.

In Johnson, this Court, in interpreting Section 30-3-5(8), stated as follows:

> Alimony is presumed to terminate upon the remarriage of the receiving spouse. Utah Code Ann. § 30-3-5(5) (1989), states that "[u]nless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of the former spouse." The trial court therefore has the discretion to make an award of alimony that will survive the marriage of the receiving spouse. In exercising this discretion, however, the trial court must make adequate and specific findings of fact justifying such an award. Such an award must also comply with the relevant legal principles governing alimony awards.

Id. at 252.

The Johnson trial court relied on two findings to support its award of nonterminable alimony. First, the trial court found that nonterminable alimony was awarded to assist in the support of the receiving spouse, Ms. Johnson. This Court indicated that "[s]tanding alone, however, it is not a sufficient reason to extend alimony payments beyond the remarriage of the receiving spouse. To allow nonterminable awards to be based on this justification alone would violate the statutory presumption against such awards, since every alimony award is necessarily based upon this justification." Id. Therefore, as an undisputed matter of law, a recipient spouse's need for alimony does not support an award of nonterminable alimony.

The Johnson trial court's other rationale for the award of nonterminable alimony was to allow Ms. Johnson to "share in the benefits of [Mr. Johnson's] professional status." Id. This Court determined that this was just another way of saying that Ms. Johnson was to share in Mr. Johnson's professional degree. This Court held that "[i]nasmuch as it is legally impermissive to grant a share or interest of one spouse's professional degree or license to another spouse upon divorce, it is likewise impermissible to award nonterminable alimony on a finding that one spouse is entitled to share in the benefits of the other spouse's professional degree or license." Id. at 253.[1] This Court concluded therefore, that the trial court's award of nonterminable alimony on these facts constituted an abuse of discretion.

Like the trial court in Johnson, the trial court in this case abused its discretion by failing to make findings which legally support its award of nonterminable alimony. As will be clearly shown below, none of the trial court's findings regarding nonterminable alimony provide factual or legal support for the award. As such, the award of nonterminable alimony must be vacated as a matter of law.

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[1]In Johnson, this Court relied on the well settled law of Utah that a professional degree or license is not marital property to be divided at divorce. See Peterson v. Peterson, 737 P.2d 237 (Utah Ct. App. 1987) and Martinez v. Martinez, 818 P.2d 538 (Utah 1991).

The trial court in this case made fifteen written findings which, at least ostensibly, relate to the award of alimony.[2] In finding no. 43, the trial court found as follows:

> a. Although the Petitioner was pursuing a college degree at the time of the parties' marriage, she set aside her personal and educational pursuits in order to raise five children, to be at home with them, to maintain the household and to enable and assist Respondent in obtaining his professional degree as well as develop his professional skills.
>
> b. The Petitioner devoted all of her attention to raising the family and supporting the Respondent during her twenty three years of marriage to the Respondent.
>
> c. Both parties had approximately equal earning capacity, education and experience going into the marriage. During the marriage, Petitioner was not able to advance her earning ability because of her support of the family and of Respondent's professional education and business.
>
> d. Respondent was able to obtain a dental degree, a graduate degree in dentistry, acquire seventeen (17) years of dental experience and establish his own private practice, giving him the earning ability of $13,500.00 a month, all with the support of the Petitioner.
>
> e. Both parties were equal contributors in advancing Respondent's educational training.

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[2]On February 1, 1999, the trial court entered a Memorandum Decision awarding the nonterminable alimony. The findings in the Memorandum Decision are similar, although not identical, to the specific findings that were included in the Findings of Facts and Conclusions of Law. The Memorandum Decision is included as Exhibit C in the Addendum.

f. Petitioner assisted in the dental practice when needed.

g. Petitioner has minimal earning capacity and no marketable skills. It is not likely given her age of forty three (43) years that Petitioner will ever attain the skills or earning capacity to support herself at the standard of living she enjoyed during the marriage.

h. Petitioner contributed $125,000.00 of her inheritance into the marriage.

i. The parties spent all of the money that Respondent earned. The parties are left with virtually no assets to be divided among them at the end of the marriage.

j. The parties have no retirement benefits or savings other than an IRA.

k. Petitioner is entitled to a non-terminable award of alimony because of her contribution to Respondent's increased earning capacity during the marriage.

l. The only way to provide the Petitioner a compensating adjustment for her contribution to the greatly enhanced earning capacity of the Respondent is to award her non-terminable alimony.

m. Non-terminable alimony will be necessary to maintain Petitioner at a standard of living similar to that which existed during the marriage.

n. This award of alimony is not an award of any interest in the professional degree of Respondent. Respondent's income from his practice may change without affecting the amount of alimony he pays to the Petitioner.

o. Respondent has the ability to pay non-terminable alimony which is less than the

> court ordered alimony in paragraphs 36 and 41 above.

The trial court's findings with respect to nonterminable alimony fall into several categories, none of which legally support the award.

Ms. Black's Need for Alimony

Findings c, g, i, j, and m relate to Ms. Black's need for alimony. The trial court noted the financial irresponsibility of the parties, the finite earning capacity of Ms. Black, and the standard of living of the parties. Each one of these findings go to Ms. Black's need for alimony. A recipient spouse's need for alimony is relevant with respect to whether alimony is awarded or not and, if so, at what amount. As indicated above, Mr. Barney is appealing neither the award of alimony nor the amount. Mr. Barney only appeals the trial court's determination that alimony would not terminate upon Ms. Black's remarriage.

As this Court made absolutely clear in Johnson, to allow a trial court to award nonterminable alimony on the basis of the financial need of the recipient spouse alone "would violate the statutory presumption against such awards, since every alimony award is necessarily based upon this justification." Id. at 252. Therefore, the trial court's findings as to Ms. Black's need for financial assistance cannot as a matter of law support the nonterminable element of the alimony award.

Mr. Barney's Ability to Pay Alimony

In finding o of paragraph 43, the trial court found that Mr. Barney has the ability to pay nonterminable alimony. This finding suffers from the same deficiency as the findings relating to Ms. Black's need for alimony. Every alimony award is necessarily based on the payor spouse's ability to pay alimony[3]. Accordingly, this fact does not support an award of nonterminable alimony. See id.

Mr. Barney's Dental Degree and Training

Findings a, c, d, e, k, l and n all attempt to justify the award of nonterminable alimony on the basis of Ms. Black's interest in Mr. Barney's dental degree and training. While the trial court articulates these findings in terms of Mr. Barney's "earning capacity," the trial court was in fact making a de facto division of Mr. Barney's professional degree, which the law forbids. This Court's decision in Johnson left no doubt that it is "legally impermissible" to "award nonterminable alimony on a finding that one spouse is entitled to share in the benefits of the other spouse's professional degree or license. Such an award is a de

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[3] The version of U.C.A. § 30-3-5(7)(a) effective at the time of trial provided:

> The court shall consider at least the following factors in determining alimony:
>
> (i) the financial condition and needs of the recipient spouse;
>
> (ii) the recipient's earning capacity or ability to produce income;
>
> (iii) the ability of the payor spouse to provide support;
>
> (iv) the length of the marriage. Id.

facto division of the professional degree or license." Id at 253. In the instant case, the trial court found that Ms. Black should receive an award of nonterminable alimony because she assisted Mr. Barney in obtaining a dental degree and training, and correspondingly, an increased earning capacity. In light of this Court's holding in Johnson, the trial court's decision constitutes a clear abuse of discretion.

The trial court's findings also fail to address the important factual point that Mr. Barney largely supported the family during dental school. Mr. Barney's dental schooling was paid for by the United States Air Force through health professional scholarships including books, tuition, fees and $400.00 per month stipend. R. 841-2.

Ms. Black's Educational and Career Development

In findings a, b, c, and g of paragraph 43, the trial court found that Mr. Barney and Ms. Black started out on even footing as to education and earning capacity at the time of the marriage. However, Ms. Black decided to not further pursue her education or career but rather decided to stay at home and care for the children of the parties. The trial court's findings in this regard go directly to Ms. Black's need for financial assistance in the form of alimony. The trial court's findings support a traditional alimony award subject to termination upon remarriage, but under this Court's decision in Johnson these findings cannot legally support the extraordinary nonterminable component of the award.

Ms. Black's Assistance in the Dental Practice

In finding f of paragraph 43, the trial court found that Ms. Black's involvement in the dental practice, when needed, was a relevant factor. The trial court's finding in this regard is relevant to the division of marital property and debt but not nonterminable alimony. As will be discussed infra in greater detail, the trial court made an inequitable division of martial property and debt in favor of Ms. Black. This division included a valuation of the dental practice. Therefore, Ms. Black received double compensation for her contribution to the dental practice. She was first compensated in the form of income derived from the practice and consumed by the parties during the course of the marriage. She was then compensated again in the division of the parties' property and debts, which was grossly inequitable.

After division of the parties' property and debts, Mr. Barney was left with a mountain of debt and his professional degree. The trial court has attempted to distribute a portion of his degree to Ms. Black in the form of nonterminable alimony. This Court's decision in Johnson clearly indicates that Utah law forbids the trial court from engaging in a de facto division of a professional degree through nonterminable alimony.[4] The disparity in earing

[4] See Petersen v. Petersen, 737 P.2d 237 (Utah App. 1987); see also Martinez v. Martinez, 818 P.2d 538 (Utah 1991) (overturned award of equitable restitution based on medical degree); Gardner v. Gardner, 748 P.2d 1076, 1081 (Utah 1988) (benefit of wife's investment in husband was adequately reflected in a greater property settlement and higher alimony); Rayburn v. Rayburn, 738 P.2d 238 (Utah App. 1987) (disparity in income due to license is adequately

capacity between Mr. Barney and Ms. Black may be addressed through a traditional alimony analysis and equitable property division but not through an award of nonterminable alimony.

Paragraph n of the trial court's findings states that "this award of alimony is not an award of any interest in the professional degree of Respondent." In fact, the nonterminable alimony component of the alimony award was a de facto division of Mr. Barney's professional degree. Merely because the trial court calls a spade a club does not make it a club. The above cited findings of the trial support a traditional award of alimony that terminates upon the recipient spouse's remarriage. This is the correct result and the result that the law requires in this case.

In summary, Mr. Barney does not appeal the alimony award or the amount. Mr. Barney only appeals the trial court's extraordinary award of nonterminable alimony because it has no basis in fact or law. The trial court was required to make findings which might support the extraordinary order that alimony does not terminate upon remarriage. The trial court failed to make such findings and therefore abused its discretion. The nonterminable component of the alimony award must be vacated.

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addressed under traditional alimony analysis)

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN THE AMOUNT OF CHILD SUPPORT AWARDED

The trial court abused its discretion in the amount of child support awarded on two grounds. First, in divorce actions where combined parental income exceeds the highest statutory table amount, evidence must be introduced to establish the reasonable needs of the children before the trial court can award child support greater than the highest table amount. Ms. Black did not introduce evidence regarding the reasonable needs of the children and the trial court entered only conclusory findings regarding the needs of the children. Second, although required under Utah case law, the trial court did not use linear extrapolation to calculate the amount of child support.

A. Ms. Black Did Not Establish the Reasonable Needs of the Children.

Utah Code Ann. § 78-45-7.12 provides:

> If the combined adjusted gross income exceeds the highest level specified in the table, an appropriate and just child support amount shall be ordered on a case-by-case basis, but the amount ordered may not be less than the highest level specified in the table for the number of children due support.

In interpreting this statutory provision, in Ball v. Peterson, 912 P.2d 1006 (Utah Ct. App 1996), this Court stated:

> where the parties' income exceeds the highest monthly combined adjusted gross income listed on the statutory table, linear extrapolation of the child support obligation table alone is not enough. Strict reliance on linear

> extrapolation would be erroneous, because taken to the extreme, a child could be awarded support vastly exceeding any reasonable need. Rather, a trial judge must consider and make specific findings on all "appropriate and just" facts.

Id. at 1014; See also Reinhart v. Reinhart, 963 P.2d 757, 759-60 (Utah Ct. App 1998). In Reinhart, this Court stated:

> [I]n child support cases where parental income exceeds the guidelines, the parties must introduce evidence to establish the reasonable needs of the children.

Id. at 760.

In the instant case, the trial court made the following findings regarding the needs of the three minor children:

> 24. The parties' children have become accustomed to a high standard of living.
>
> 25. The parties' children should be given support at a minimum to allow them to continue their lives with some semblance to what they have had in the past.
>
> 26. The children should not be punished financially by this divorce.
>
> 27. The children can be and deserve to be maintained at their accustomed standard of living. They need higher child support than the maximum provided by the statutory table.
>
> 28. Respondent is able to pay more child support than would be required under statutory guidelines.

R. 848.

First, with respect to findings 24, 25 and 27, the trial court makes a vague reference that the children enjoyed a "high standard of living" and "deserve to be maintained at their accustomed

standard of living." However, Ball and Reinhart do not allow child support to be awarded based on the "standard of living" but rather on the "needs of the children." That distinction is critical in this case due to fact that the trial court judge and the domestic relations commissioner both found that the parties had been "both financially and fiscally irresponsible" living an "extremely extravagant lifestyle" well beyond their means. R. 149 and R. 995, pp. 41-2. In fact, the trial court judge in his bench ruling stated:

> Now when we are considering both child support and alimony, it's very difficult for me to determine what kind of a standard of living that, obviously you were living so extravagantly that there is no way that there's going to be money that you are going to be able to maintain anywhere near the kind of standard of living that either one of you were living before. Just can't do it. There's not money there to do it with.

R. 995, p. 42. The standard is the reasonable needs of the children, not an unaffordable extravagant lifestyle that the parties improvidently attempted to live.

Second, Ball and Reinhart require a qualitative or quantitative analysis of the children's reasonable needs. Other than the findings as noted above, the trial court made no findings on the qualitative needs of the children and no evidence was presented regarding the same.

Similarly, the trial court made no quantitative findings on the reasonable needs of the children. It is further difficult to

marshal evidence from the record on the quantitative needs of the children, in that no evidence was presented on that issue. The only evidence which comes close is the testimony of Ms. Black on her claimed financial needs. Ms. Black introduced exhibit no. 40 as to her living expenses and testimony was elicited from her regarding the same. R. 993, pp. 26-31 and 59-78; R. 994, pp. 471-2.

It is clear from reviewing exhibit no. 40 and the portions of the transcript noted above that the parties were paying exorbitant amounts for basic living expenses. For example, housing costs including the mortgage payment, taxes, insurance, maintenance and utilities, totaled more than $3,712.00 per month. Similarly, Ms. Black claimed $715.00 per month for transportation costs for one vehicle and $750.00 per month for food costs for four people. Noticeably, however, Ms. Black included no amounts in exhibit no. 40 for special expenses for the children other than that of their pro-rata share of the expenses listed. The children were not privileged in receiving and the parties were not paying for such items as private schooling, special educational needs, lessons, extra-curricular activity costs, exotic travel, and lavish gifts. In essence, during the marriage of the parties, the children experienced a very customary lifestyle enjoyed by other children of the general populace. The reasonable needs of the children experiencing such a lifestyle can be supported by a standard award of child support at the highest table amount.

Third, in finding no. 26, the trial court found that the children should not be punished financially by this divorce. While Mr. Barney agrees with that statement, such is not a factor that the trial court can or should consider for the reason that the statement also holds true for Mr. Barney. An "appropriate and just" award of child support based on relevant factors is the task before the trial court, not a determination of who should and should not be punished financially because of the divorce.

Finally, in finding no. 28, the trial court found that Mr. Barney had the ability to pay more child support than would be required under statutory guidelines. However, in isolation, that finding is insufficient to permit an award of child support above the highest table amount. In Reinhart, the former wife brought an action against the former husband seeking upward modification of the child support award based on the increase of the husband's gross monthly income. In Reinhart, this Court stated:

> [A] demonstration of an increase in the obligor's income alone is not sufficient to increase the child support order. The increase in ability to pay must be considered in light of the children's actual needs in fashioning an "appropriate and just" child support award under section 78-45-7.12.

Id. at 760. In the instant case, finding no. 28 has no relevance on this issue unless the court also determines the reasonable needs of the children, which the trial court utterly failed to do.

In summary, Ms. Black failed to introduce evidence to establish the reasonable needs of the children. The trial court

failed to consider and make specific findings on all "appropriate and just" factors. Accordingly, the child support award should be set at no more than the highest table amount.

B. The Trial Court Did Not Use an Acceptable Method of Linear Extrapolation to Calculate the Amount of the Child Support Award.

Assuming *arguendo* that it is proper in this case for the trial court to award child support above the highest table amount, the trial court did not use an acceptable method of linear extrapolation to calculate the amount of the child support award. Linear extrapolation presupposes the use of an accepted method of linear regression analysis, such as the "least squares" method, or using the actual formula incorporated into the statutory child support tables.

In conjunction with the admission of exhibit no. 15, Mr. Barney presented evidence and proposed that child support be based on gross monthly incomes of $893.00 for Ms. Black and $10,000.00 for Mr. Barney. Based on those incomes, the child support award would be $1,660.00 per month.

In its ruling, the trial court did not use a linear regression analysis to calculate the amount of child support to be paid by Mr. Barney. Rather, the trial court employed a simple ratio method by calculating the percentage of child support Mr. Barney would pay if his income were $10,000.00 (and Ms. Black had imputed income of $893.00) and then used that same percentage, 16.6%, and applied it to the gross monthly income the trial court ultimately found Mr.

Barney to be earning in the amount of $13,500.00. This ratio method results in child support of approximately $2,220.00 per month. R. 849.

The trial court did not take any evidence on acceptable methods of linear regression analysis. Using the "least squares" method of linear regression would, for example, result in a child support award less than the amount actually awarded by the trial court. When multiplied by the number of years that Mr. Barney will be paying child support, the error of the trial court is compounded to substantial dollar amounts.

In summary, the trial court abused its discretion in the amount of child support awarded to Ms. Black. The trial court failed to make specific findings to establish that the reasonable needs of the children necessitated an award of child support greater than the highest table amount. Moreover, the trial court used an improper method of extrapolation. This Court should vacate the trial court's improper award and set child support consistent with the highest level of the statutory table.

III.

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING MS. BLACK JUDGMENTS FOR ONE HALF OF THE VALUE OF CERTAIN PROPERTY AWARDED TO MR. BARNEY

Utah law requires that a trial court distribute property in a divorce in a fair and systematic fashion. See Burt v. Burt, 799 P.2d 1166, 1172 (Utah Ct. App 1993). The overriding consideration

is that the division be "equitable." Id. at 1171. Utah law presumes that each party is entitled to all of his or her separate property and fifty percent of the marital property. See Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993); see also Burt v. Burt, 799 P.2d 1166 (Utah Ct. App. 1993). "[O]nce a court makes a finding that a specific item is marital property, the law presumes that it will be shared equally between the parties unless unusual circumstances, memorialized in adequate findings, require otherwise." Hall, 858 P.2d at 1022. Therefore, a trial court's deviation from an equal division of marital property is an extraordinary division that requires unusual circumstances and the trial court to make appropriate findings.

Utah law addresses the division of debt in a similar fashion. The trial court must first characterize, as either separate or marital, the debt present at the time of trial. The trial court must then divide the debt between the parties in a fair and equitable manner. See Fletcher v. Fletcher, 615 P.2d 1218, 1222-23 (Utah 1980); see also Sinclair v. Sinclair, 718 P.2d 396 (Utah 1986). The division of marital debt differs from the division of marital property in so much as the law does not presume that the division of debt must be "equal" to be "equitable". Id. The trial court must then make findings, however, on the impact the division of debt has on the payor spouse's ability to pay alimony. See Wiley v. Wiley, 866 P.2d 547, 551-52 (Utah Ct. App. 1993).

In the instant case, the trial court's division of the marital property[5] and debt was undeniably grossly unequal. As described in the following table, the total net value of the marital property and debt was only $8,572.00. If the trial court had equally divided the marital property and debt, each party would have received $4,286.00 ($8,572.00 ÷ 2) of net value. However, Ms. Black was awarded property and debt with a positive net value of $26,255.00 and Mr. Barney was awarded property and debt with a negative net value of $<17,683.00>. Accordingly, Ms. Black was awarded $21,969.00 more in net value as compared to which she would have received if there had been an equal division ($26,255.00 - $4,286.00), The trial court then also properly considered the impact of assigning Mr. Barney all of the tax debt and made allowance for such in the amount of alimony awarded. R. 851. Although grossly unequal, Mr. Barney does not necessarily claim that the division was inequitable. However, the trial court did not stop there.

Surprisingly, and without any factual or legal explanation, the trial court also awarded judgment against Mr. Barney in favor of Ms. Black for one-half of the value of the property he was awarded. The judgments were in the amount of (i) $8,000.00, constituting one-half the net value of the duplex awarded to Mr.

---

[5]Other items of property such as the furniture, furnishings and vehicles were divided by the parties on an equitable basis and the trial court approved the same.

Barney; and (ii) $20,000.00, constituting one-half the total value of the dental practice awarded to Mr. Barney.

The division of the property and debt by the trial court as well as the award of the judgments is illustrated as follows:

	Total Value	Awarded to Ms. Black	Awarded to Mr. Barney
Property and Debt Elements			
Dental Practice	$40,000		$40,000
Marital Residence (net equity)		$24,455	24,455
Duplex (net equity)		16,000	16,000
IRA	3,600	1,800	1,800
Taxes	<75,483>		<75,483>
Subtotal	8,572	26,255	<17,683>
Judgment Elements			
Amount for duplex		8,000	<8,000>
Amount for dental practice		20,000	<20,000>
TOTAL	$ 8,572	$54,255	$<45,683>

The trial court's rationale in making such an unequal division of the marital property and debt as well as the award of $28,000.00 of judgments was: (i) Ms. Black's contribution of her inheritance to the marriage; (ii) Mr. Barney's assumed ability to pay the tax debt in the future; and (iii) both parties having consumed, better stated wasted, all marital property so that there was literally no property to award either party at the time of trial. R. 995, pp. 56-8 and R. 996, pp. 55-60. As discussed above, the trial court relied on these same factors to support the award of nonterminable alimony.

While the trial court's division of marital property and debt such that Ms. Black received a positive value of $26,255.00 and Mr. Barney received a negative value of $<17,683.00> is cause for concern, the trial court's additional award of judgments in the amounts of $8,000.00 and $20,000.00 lacks any intelligible legal foundation. The trial court attempted to justify such on the same basis used to make its unsupportable award of nonterminable alimony. The trial court's division of property and debt, particularly in light of $28,000.00 of judgments that were awarded out of the thin air, is not only inequitable it offends any sense of justice or reason.

The only possible explanation for the trial court's grossly inequitable division of marital property and debt is that the trial court considered the value of the dental practice that was proffered by Ms. Black. Ms. Black's appraiser valued the dental practice at $227,000.000 which included goodwill. Despite Mr. Barney's Motion in Limine and objections at trial to exclude the consideration of goodwill, the trial court referred to Ms. Black's ascribed value in paragraph 8(c) of the trial court's findings by stating "there was substantial evidence that the dental practice has the value assigned by Petitioner's appraiser of two hundred twenty seven thousand dollars ($227,000.00) which included goodwill." The trial court's apparent consideration of that value was clear error. This Court has made it clear that Utah law does not permit the valuation of a sole practitioner's practice unless the professional has retired and

sold the practice. See Sorenson v. Sorensen, 839 P.2d 774, 775-76 (Utah Ct. App. 1989).

In summary, the trial court's award of judgments for one half of the value of certain property awarded to Mr. Barney constituted a grossly inequitable property division and lacks any intelligible basis in law. The judgments should be vacated.

CONCLUSION

Based on the foregoing, Mr. Barney respectfully requests this Court to order that (i) Ms. Black's alimony award terminate on remarriage; (ii) child support be awarded at the highest statutory table amount; and (iii) the judgments in the amounts of $8,000.00 and $20,000.00, entered as a part of the property division of the trial court, be vacated.

DATED: April 3, 2000

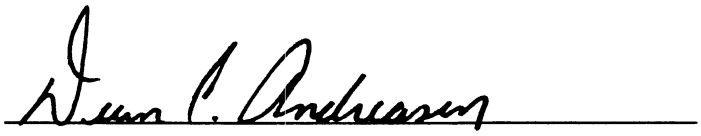
CLYDE SNOW SESSIONS & SWENSON

DEAN C. ANDREASEN
MATTHEW A. STEWARD
Attorneys for
Respondent/Appellant/Cross Appellee
V. Craig Barney

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2000, a true and correct copy of the foregoing **BRIEF OF APPELLANT** was mailed, postage prepaid, first-class, to:

Cherise Roundy (Barney) Black
55 East 700 South, #56
St. George, UT 84770



Tab A

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IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

CHERISE ROUNDY, Petitioner, vs. V. CRAIG BARNEY, Respondent.	**FINDING OF FACT AND CONCLUSION OF LAW** Civil No. 974900793 DA Judge Stanton M. Taylor

JUN 0 8 1999

Petitioner's Complaint for Divorce was heard on October 27, 1998 and October 29, 1998 before the Honorable Stanton M. Taylor, District Judge presiding.

Petitioner was present and represented by her attorney Steve S. Christensen. Respondent was present and represented by his attorney Dean Andreasen.

The court having received and considered all of the evidence presented by way of testimony and exhibits and having reviewed all memoranda and arguments presented by both attorneys, now enters its:

FINDINGS OF FACT

A. THE COURT FINDS THAT THE PARTIES HAVE STIPULATED AND AGREED AS FOLLOWS AND THAT THIS STIPULATION IS REASONABLE AND IS IN THE BEST INTEREST OF THE MINOR CHILDREN:

1. The parties were married on June 6, 1974 and were divorced by way of an order of Bifurcation November 16, 1997.

2. The parties will share joint legal custody of the minor children. Petitioner will have the primary physical custody, care and control of the minor children, subject to reasonable rights of visitation of the Respondent described as follows:

a. Petitioner will always have the children during the first half of the Christmas vacation including Christmas day. The Respondent will have the second half of the Christmas vacation including News Years Day. This way the children will not have to travel on Christmas Day.

b. Petitioner will always have the children during the Easter Holiday and during the Utah Spring Break.

c. The Respondent will have the children during the UEA break that they have from school in the fall each year. He will also have the children for Labor day and Memorial Day.

d. Petitioner will always have the children for the 24th of July, as they do not celebrate this in Montana.

e. Respondent will always have the children during the week of the 4th of July. He has the option to use some of his summer vacation during that time. He has a total of four weeks he can spend with the children during the summer. Basketball camps in Montana will be taken into consideration as these are important to the children.

f. Respondent will have the children for Thanksgiving during the ODD years.

g. Petitioner will have the children for Thanksgiving during the EVEN years.

h. The parties will try to cooperate with one another in the summer months and try to get the children to participate in extended family reunions whenever possible. Trading July 4th or July 24th to allow for family reunions will be acceptable. If a family reunion conflict exists in the summer, the parties will alternate taking the children: Petitioner will have the children during the 1st conflict time and Respondent will have the next, etc.

i. Respondent has the option of scheduling his visitation on 3-day weekends if it works into his schedule, so he will be able to see the children longer on

his trips to Utah. Petitioner has second option on 3-day weekends (except Labor Day and Memorial Day, which Respondent already has.) If Cherise desires to have the children on one of these minor holiday weekends, for a special event, then Respondent will try to arrange a different time to see the children that month. Petitioner will let Respondent know of any such problems as soon as possible. Respondent will try to be as flexible with these minor holiday changes as his work schedule permits.

j. On months that do not have minor holidays, Petitioner will permit the children to miss one day of school on a Monday to visit with Respondent, provided he calls the school and arranges it with them. Respondent must also have the children bring their schoolwork with them so they can return to school on Tuedsay and not be behind.

k. Respondent will provide a proposed summer schedule by the prior April 15 which will give Petitioner time to arrange any desired changes. Petitioner will have until April 30 to reply to the summer schedule. The parties will submit any dispute they cannot resolve regarding visitation to mediation with the parties sharing the costs thereof initially. The ultimate cost of mediation may be allocated differently by the court.

l. Annie will arrange her own exceptions to this schedule with Respondent. The other children will also have the right to work things out with Respondent if there are conflicting school activities.

m. Respondent will try to give Petitioner visitation schedules at least six months but not more than one year in advance. Respondent has already submitted his proposed schedule for 1999 attached as Exhibit 'A'.

n. Petitioner will always have two weeks to agree to or to suggest changes to any visitation schedule Respondent sends her. This two week time period will begin from the day Petitioner first receives the visitation schedule by certified mail. If Petitioner does not pick up the certified mail, it will be presumed that she received it five days after Respondent's mailing is post marked.

o. Family emergencies, Weddings, Funerals, etc. will take precedence over the visitation schedule. Respondent and Petitioner will work together to allow each other as much notice as possible for these things. Respondent will make all changes in the visitation schedule in writing 45 days in advance. Petitioner will have two weeks to reply to suggested changes.

p. The parties shall implement, as applicable, the advisory guidelines set forth in Utah Code Annotated §30-3-33, a photocopy of which is attached as Exhibit 'B'.

3. The parties have stipulated that the personal property has been evenly divided and the parties will each retain the personal property presently in their possession, except that the Respondent will be awarded the hot tub, together with the electrical box, stairs and accessories for the hot tub, installed at the Ogden property.

4. The parties' daughter, Angelina Cherise Barney, age 17, is driving one of the parties' vehicles. The parties agree to give title to such vehicle to their daughter, Angelina, within thirty days of the signing of this order.

5. The parties agree to the value of their real property as appraised as follows: The value of the marital residence in Ogden, Utah is two hundred sixty eight thousand dollars ($268,000.00) and the value of the Bozeman, Montana duplex is two hundred and six thousand dollars ($206,000.00).

6. The parties stipulate that the payoffs on the mortgages as of October 26, 1998 are as follows: The payoff on the Ogden home is two hundred forty three thousand five hundred forty four dollars and sixty seven cents ($243,544.67) and the payoff on the Montana duplex is one hundred and ninety thousand dollars ($190,000.00) as of October

31, 1998. The equity at the time of trial in the duplex is sixteen thousand dollars ($16,000.00). The equity at the time of trial in the marital residence in Ogden, Utah was twenty four thousand four hundred fifty five dollars thirty three cents ($24,455.33) minus all costs necessary to get that residence out of foreclosure, including but not limited to property taxes, late fees, interest, attorney's fees and court costs.

7. The parties stipulate that the Respondent will provide a health insurance program for the minor children of the parties covering hospital, doctor, medical expense incurred by the children. The cost of this insurance will be evenly divided between the parties. Further, the parties will each pay one-half of all out-of-pocket reasonable and necessary medical, dental and orthodontia expenses paid to and for third parties and not covered by said insurance.

8. This stipulation is fair and reasonable and in the best interests of the minor children.

B. THE COURT MAKES THE FOLLOWING FINDINGS BASED ON THE EVIDENCE PRESENTED AT TRIAL:

Life Insurance

1. Respondent is able to and should maintain the two hundred fifty thousand dollar ($250,000.00) life insurance policy on his life now in effect for the benefit of the

Petitioner and the minor children of the parties, naming the Petitioner as the beneficiary. After child support terminates, then life insurance should be maintained for the benefit of Petitioner with the face amount of one hundred twenty five thousand dollars ($125,000.00) during the period of time Respondent may be liable for alimony.

INHERITANCE

2. Petitioner received an inheritance of one hundred and twenty five thousand dollars ($125,000.00) from her grandfather during the marriage.

3. The petitioner's inheritance from her grandfather was commingled by her with the parties' marital assets and was not maintained as her separate property:

a. Fifty three thousand dollars ($53,000.00) of that inheritance came in small amounts spread over time between 1988 and 1996.

b. In 1991, Mrs. Roundy received a lump sum distribution of forty seven thousand dollars ($47,000.00) of her inheritance which was commingled with the parties' marital assets and/or used to pay marital family expenses.

c. Finally, in 1996, Petitioner received an inheritance distribution of twenty five thousand dollars ($25,000.00) which was commingled with the parties' marital assets and/or used to pay marital family expenses. This inheritance was used in lieu of the four

thousand dollars ($4,000.00) a month Respondent had otherwise taken from the practice and given to Petitioner for the family's regular living expenses, including but not limited to food, household items, gas, medical copayments, clothes, school expenses, gifts, entertainment, travel, grooming and miscellaneous expenses.

Dental Practice

4. The court finds that the tangible assets of the Respondent's dental practice are marital property.

5. The dental equipment is the only tangible asset of the dental practice and is marital property. The current amount of dental practice accounts receivable approximate the current amount of dental practice accounts payable as evidenced by Exhibit numbers 25 and 26 and, accordingly, net each other out. A list of the dental equipment is attached as Exhibit 'C' hereto, and made a part of these findings.

6. The dental equipment has a current value of forty thousand dollars ($40,000.00). This is the value assigned to the equipment by Respondent.

7. The present value of the dental equipment assets of the dental practice should be evenly divided between the parties: twenty thousand dollars ($20,000.00) to each party.

8. The court could not consider the following equities in dividing the dental assets because of the decision of Sorenson v. Sorenson, 839 P2.d 774 (Utah 1992):

a. Petitioner contributed all of her inheritance from her grandfather to the family's expenses in lieu of taking funds from the dental practice for that purpose.

b. The court does not find a specific value in regards to the dental practice because of the decision in Sorenson v. Sorenson, 839 P.2d 774 (Utah 1992). The court cannot consider the value of goodwill and reputation of Respondent's dental practice. Although only forty thousand dollars ($40,000.00) of the value of the dental practice is divisible as marital property, there was substantial evidence that the dental practice has the value assigned by Petitioner's appraiser of two hundred twenty seven thousand dollars ($227,000.00) which included goodwill.

c. The parties have the following education and work experience:

i. Respondent completed three years of his bachelor's degree prior to the marriage.

ii. Petitioner attended college prior to the marriage of the parties.

iii. The parties were married in June 1974.

iv. Respondent was accepted to dental school at the University of Iowa beginning the 1974-1975 school year. Respondent's

first year of dental school was accepted as credit for the fourth year of his bachelor's program and he was awarded his bachelor's of science degree in 1975.

v. Respondent's dental schooling at Iowa was paid for by the United States Air Force through a health professional scholarship. Respondent's books, tuition and fees were paid and Respondent received a $400.00 per month stipend. Both parties worked part-time jobs during schooling to supplement the parties income.

vi. Respondent was awarded his dental degree in 1978.

vii. Respondent also attended the Oregon Health Science University from 1982 to 1984 and was awarded a certificate in periodontics in 1984.

viii. Petitioner left her university studies in Utah to go with Respondent to an out-of-state dental school.

ix. At the time the parties began having children, the parties agreed that Petitioner would stay home to care for the children and the household. Petitioner spent twenty three

years of the marriage supporting Respondent by caring for Respondent, raising the parties' five children, and caring for the household while Respondent pursued schooling and developed his career. Petitioner stayed at home with the children throughout the marriage and did not obtain formal schooling or work experience.

x. Petitioner has worked sporadically in Respondent's dental practice substituting for regular office employees and as a dental assistant when necessary. Petitioner also helped Respondent set up and decorate his office.

Real Property

9. The Montana duplex should be awarded to Respondent at a value of $16,000.00. Respondent currently resides in the Montana duplex while Petitioner resides in Ogden, Utah.

10. The Montana duplex is marital property. One-half of the equity of the Montana duplex should be awarded to Petitioner in the amount of eight thousand dollars ($8,000.00).

11 There is not any value in the marital residence in Ogden, Utah because the home went into foreclosure. Respondent has indicated that he desires to give a deed in lieu of foreclosure to the current mortgagee which would result in no equity in that property.

12. However, the marital residence in Ogden, Utah should be awarded to Petitioner in the event that she may be able to secure any assistance to save the home from foreclosure. If any liens for marital debts are attached to the home, Respondent should be ordered to pay such debts, hold Petitioner harmless from payment of such debts and indemnify Petitioner relative to any payment she makes towards such debts on the marital residence in Ogden, Utah.

IRA

13. The IRA of the parties in the amount of three thousand dollars ($3,600.00) held at Piper Jaffrey under account #522-12670-220 is marital property.

14. The court finds that Respondent should pay and has paid one half of said IRA account to Petitioner in the cash amount of approximately $1,800.00.

Debt Division

15. Respondent should be ordered to pay all of the parties' past due Internal Revenue Service debt for the years 1995 and 1996, to hold Petitioner harmless therefrom

and to indemnify Petitioner for any payment she makes thereon. The IRS debt for 1995 is three thousand five hundred fourteen dollars ($3,514.00). The IRS debt for 1996 is sixty two thousand three hundred twelve dollars ($62,312.00). All 1997 and 1998 taxes were filed separately by the parties and each party is responsible for any tax debt on income reported on such separate returns by him or her for those years.

16. Respondent should be ordered to pay all of the parties' past due state tax debts for the year 1996, to hold Petitioner harmless therefrom and to indemnify Petitioner for any payment she makes thereon. The Montana State Tax debt for 1995 is paid in full. The Montana State Tax debt for 1996 is nine thousand six hundred fifty seven dollars ($9,657.00). All 1997 and 1998 taxes were filed separately by the parties and each party is responsible for any tax debt on income reported on such separate returns by him or her for those years.

17. In reaching its finding that all tax debt payments should be made by Respondent, the Court has considered the following factors, which the court also finds:

a. The income from which the taxes are assessed was earned Respondent;

b. The Respondent alone has the earning ability to pay such tax liability;

c. Petitioner contributed her inheritance of one hundred twenty five thousand dollars ($125,000.00) to the marital estate;

d. Respondent was primarily in control of the family finances during the marriage while the taxes were being incurred

18. The parties should each bear his or her own debt for the vehicle each is driving as each party is awarded his or her vehicle.

19. The parties should each pay the mortgages on the real property awarded to him or her.

20. If Petitioner is able to keep the marital residence in Ogden, Utah, Respondent will be responsible to pay current all real property taxes for all years prior to and including 1998, in the amount of eighty eight hundred dollars ($8,800.00) plus interest after October 31, 1998, in order to enable Petitioner to refinance such property, consistent with the court's order from the January 11, 1999 hearing in this case. If Petitioner is not able to retain the marital residence in Ogden, Utah, Respondent should be ordered to hold Petitioner harmless against collection of any delinquent real property taxes on the marital residence in Ogden, Utah.

a The temporary order of the court required Respondent to pay the real property taxes on the martial residence in Ogden, Utah.

b. Respondent did not make the tax payments as ordered.

c. Respondent alone has the ability to make the past due property tax payments on the marital residence in Ogden, Utah.

21. Respondent is ordered to pay all marital debt incurred prior to April 1997 not specifically addressed under paragraphs 15 through 20 above, to hold Petitioner harmless therefrom and to indemnify Petitioner for any payment she makes thereon. Except as otherwise ordered by this court, Petitioner is ordered to pay all debts separately incurred by her since her bankruptcy in 1998. Respondent is ordered to pay debts separately incurred by him after March, 1997 in addition to the other debts assigned to him by the court. This order of marital debt payment is made, considering the following equities:

a. The Respondent alone has the ability to pay such marital debts;

b. Petitioner contributed her inheritance of one hundred twenty five thousand dollars ($125,000.00) to the marriage;

c. Respondent was primarily in control of the family finances during the marriage while the marital debts were being incurred.

22. The order that Respondent pay marital debt on behalf of the Petitioner is made by way of further support and maintenance for the Petitioner and is not to be

considered a property settlement. Respondent should be ordered to hold Petitioner harmless therefrom and to indemnify Petitioner for any payment she makes thereon.

Child Support

23. The parties have three minor children: Angelina Cherise, 12/21/82; Sandin Craig, 9/18/85; and Fabione Sadie Marcella, 12/19/87. Respondent should pay support for these children until each attains age 18 or graduates from highschool, whichever occurs last.

24. The parties' children have become accustomed to a high standard of living.

25. The parties' children should be given support at a minimum to allow them to continue their lives with some semblance to what they have had in the past.

26. The children should not be punished financially by this divorce.

27. The children can be and deserve to be maintained at their accustomed standard of living. They need higher child support than the maximum provided by the statutory table.

28. Respondent is able to pay more child support than would be required under statutory guidelines.

29. Respondent can and should pay an amount equal to sixteen point three percent (16.6%) of his current pretax income as child support.

30. Respondent's gross income after he pays his business expenses is thirteen thousand five hundred dollars ($13,500.00) per month average. Respondent should pay child support of $2,220.00 a month, initially, calculated as follows:

a. Using a sole custody worksheet, if Petitioner has a gross monthly income of $893.00 and Respondent has the highest gross monthly income on the table of $10,000.00, child support would be $1,660.00 or approximately 16.6 percent of the highest gross monthly income on the child support table for Respondent. Extrapolating this percentage to Respondent's actual gross monthly income of $13,500.00 results in child support of approximately $2,220.00 per month ($13,500.00 x 16.6 percent). Child support shall be recomputed using the same methodology when there is a change in circumstances under Utah law.

b. Child support shall continue for a child until the child attains the age of 18 years or graduates from high school with his or her regular class, whichever is later.

Alimony

31. Although Petitioner is enrolled at Weber State University and is entitled to pursue her education, it is not reasonably likely she will eventually be able to earn sufficient income to support her and her family in the lifestyle she enjoyed during the parties' marriage.

32. Petitioner has a need for alimony in an amount greater than Respondent has the ability to pay.

a. The parties lived an extravagant and expensive lifestyle.

b. Petitioner does not have the ability to support herself at the same expensive level she has had in the marriage.

33. Respondent earns an average of thirteen thousand five hundred dollars ($13,500.00) in income each month after his business expenses.

34. Respondent is self employed as a periodontist in Bozeman, Montana. Although he closed his second office in Layton, Utah in 1997, Respondent continued to make an income equivalent to or greater than the income he had with two practices.

35. Respondent's ability to pay alimony to the Petitioner is limited by the following:

a. Respondent should be required to pay income taxes for state, federal and self employment on his entire income. The taxes on thirteen thousand five hundred dollars ($13,500.00) a month, without any deduction for alimony, will be four thousand eight hundred fifty five dollars ($4,855.00). After Respondent pays these taxes he will have eight thousand six hundred and sixty five dollars ($8,665.00) of disposable income each month.

b. After Respondent pays two thousand two hundred and twenty dollars ($2,220.00) of child support, he will have six thousand four hundred and forty five dollars ($6,445.00) of disposable income each month.

c. Respondent can make payments of three thousand dollars ($3,000.00) per month to the IRS and other creditors in order to resolve the unpaid marital obligations. After this payment, Respondent will have only three thousand four hundred and forty five dollars ($3,445.00) of disposable income each month.

d. Respondent will be permitted one thousand four hundred forty five ($1,445.00) a month for his own needs and living expenses.

36. Respondent's ability to pay alimony presently is limited to two thousand dollars ($2,000.00) per month for five years because of the debt responsibilities the court

has assigned to Respondent. Respondent should be ordered to pay alimony of two thousand dollars ($2,000.00) per month for five years.

37. Respondent submitted expenses of $3,700.00 a month as his reasonable living expenses and needs in Trial Exhibit 14. The court specifically finds that of the amount claimed, $100.00 a month will be paid by Petitioner as her share of the children's health insurance premium. The Respondent's visitation trip to see the children will not be necessary because under paragraph 54 below the court will permit the children to travel to Montana by bus. For three children to travel to Montana by bus, Respondent's cost will be $240.00 a month.

38. Even if Respondent's reasonable living expenses and needs are equivalent to the remaining three thousand three hundred forty dollars ($3,340.00) which Respondent claims in Trial Exhibit 14, the court finds that he has sufficient income to provide for those needs.

39. Any funds needed for Respondent's reasonable needs and living expenses in addition to the living expenses allowed by the court in subparagraph 35(d) above, may be taken from discretionary expenses in his business that will no longer be needed, including the income that had previously gone to the following: Travel to and

expenses for Respondent's Layton office, attorneys fees for the divorce, off-site accounting expenses, travel to and expenses for implantation courses and Respondent's practice's automobile.

40. After five years from the date of the entry of decree, Respondent will have an increased ability to pay additional alimony. Respondent has the ability to pay off Internal Revenue Service arrearage and other marital debts within five years which pay off will reduce his expenses by three thousand dollars ($3,000.00) a month.

41. After five years from the date of the entry of decree, Respondent should be ordered to increase his alimony payments to a total alimony payment of three thousand dollars ($3,000.00) per month because he will have an additional ability to pay alimony after he pays off the marital debts.

42. Based upon the courts' memorandum decision dated January 28, 1999, a portion of the alimony awarded to the Petitioner should be non-terminable, even if Petitioner remarries or cohabits, as follows:

a. If Petitioner remarries or cohabits for the first time, before five years from the date the Order regarding Property and Support Issues Pursuant to Divorce is signed, the Petitioner's alimony should immediately be lowered from the amount of alimony provided in

paragraph 36 above to one thousand five hundred dollars ($1,500.00) a month. After five years from the date such Order is signed, Petitioner's alimony should be raised to $2,000.00 per month.

b. If Petitioner remarries or cohabits for the first time after five years from the date the Order regarding Property and Support Issues Pursuant to Divorce is signed, the Petitioner's alimony should be lowered from the amount of alimony provided above in paragraph 41 above to the amount of $2,000.00 per month.

43. Non terminable alimony is appropriate under the facts of this case because:

a. Although the Petitioner was pursuing a college degree at the time of the parties' marriage, she set aside her personal and educational pursuits in order to raise five children, to be at home with them, to maintain the household and to enable and assist Respondent in obtaining his professional degree as well as develop his professional skills.

b. The Petitioner devoted all of her attention to raising the family and supporting the Respondent during her twenty three years of marriage to the Respondent.

c. Both parties had approximately equal earning capacity, education and experience going into the marriage. During the marriage, Petitioner was not able to advance her earning abilities because of her support of the family and of Respondent's professional education and business.

d. Respondent was able to obtain a dental degree, a graduate degree in dentistry, acquire seventeen (17) years of dental experience and establish his own private practice, giving him the earning ability of $13,500.00 a month, all with the support of the Petitioner.

e. Both parties were equal contributors in advancing Respondent's educational training.

f. Petitioner assisted in the dental practice when needed.

g. Petitioner has minimal earning capacity and no marketable skills. It is not likely given her age of forty three (43) years that Petitioner will be able to ever attain the skills or earning capacity to support herself at the standard of living she enjoyed during the marriage.

h. Petitioner contributed $125,000.00 of her inheritance into the marriage.

i. The parties spent all of the money that Respondent earned. The parties are left with virtually no assets to be divided among them at the end of the marriage.

j. The parties have no retirement benefits or savings other than an IRA.

k. Petitioner is entitled to a non-terminable award of alimony because of her contribution to Respondent's increased earning capacity during the marriage.

l. The only way to provide the Petitioner a compensating adjustment for her contribution to the greatly enhanced earning capacity of the Respondent is to award her non-terminable alimony.

m. Non-terminable alimony will be necessary to maintain Petitioner at a standard of living similar to that which existed during the marriage.

n. This award of alimony is not an award of any interest in the professional degree of Respondent. Respondent's income from his practice may change without affecting the amount of alimony he pays to the Petitioner.

o. Respondent has the ability to pay non terminable alimony which is less than the court ordered alimony in paragraphs 36 and 41 above.

44. The alimony provided in paragraphs 36, 41 and 42 should continue until April 30, 2021, this being the length of the marriage of the parties from the date of divorce. Non-terminable alimony will terminate on the death of either party.

Tax Exemptions

45. The Respondent should be permitted to claim the children as tax exemptions.

Attorneys Fees

46. Petitioner should be awarded her attorney's fees, expert witness fees and costs requested at trial.

47. Respondent has the ability to pay Petitioner's fees ordered in this paragraph as part of the judgment awarded to Petitioner below.

48. Petitioner does not have the ability to pay her attorney's fees.

49. Respondent has the ability to pay the attorney's fees requested by Petitioner at trial.

50. However, Respondent does not have the ability to pay Petitioner's attorney's fees and costs incurred at trial over the amount estimated in Petitioner's Attorney's Fee Affidavit as follows: attorney's fees of $1,100.00 and costs of $392.00. Respondent does not have the ability to pay attorney's fees and costs incurred by

Petitioner after trial for the preparation of post trial memoranda on non-terminable alimony and the Findings of Fact among other post trial work in the amount of $15,400.00.

51. The court finds that one hundred and twenty dollars ($120.00) per hour charged for Mr. Christensen's work is reasonable.

52. Mr. Christensen's time spent in this case through trial was necessary and reasonable in order to adequately represent Petitioner.

53. The amount of attorney's fees requested at trial are reasonable and necessary as follows:

a. Petitioner's attorney's fees requested at trial were twelve thousand seven hundred dollars ($12,700.00); and in addition

b. Petitioner's expert witness fees are one thousand five hundred dollars ($1,500.00) for the dental practice appraiser, ~~six hundred fifty five dollars~~ five hundred sixty two dollars and fifty cents ($562.50) for trial preparation and testimony by Petitioner's accountant and three hundred dollars ($300.00) for J. F. Pingree the accountant who consulted with Petitioner's attorney in preparing this case for trial; and in addition

DCA

c. Petitioner's costs are five hundred ninety three dollars and twelve cents ($593.12) for deposition transcripts, Exhibits and court fees.

Visitation

54. The children should be permitted to travel to their father's home for visitation by bus as long as such travel is made without causing the children to have to transfer buses.

55. Respondent may supply the court with alternative travel proposals.

56. Respondent should pay for all visitation travel expenses.

57. Respondent is the only party able to pay for visitation travel expenses.

Judgment

58. The requested offsets to Petitioner's judgment against Respondent should be allowed as follows:

a. All of Respondent's attorneys fees of two thousand five hundred and fifty dollars ($2,550.00) for the May 18, 1998 hearing should be paid by Petitioner.

i. The Commissioner made a specific finding that attorneys fees for the May 12, 1998 hearing were Petitioner's responsibility.

ii. It would be reasonable for Petitioner to pay Respondent's fees for the May 18, 1998 hearing in light of the circumstances.

b. Petitioner's share of the medical expenses for the children incurred prior to October 29, 1998 in the amount of one thousand nine dollars and five cents ($1009.05).

c. The Petitioner's agreed share of the appraisal paid by Respondent in the amount of two hundred dollars ($200.00).

d. Respondent's one thousand dollar ($1,000.00) payment in December, 1997 towards the judgment against him.

59. After the above adjustments, the prior judgment of the Petitioner should be the original amount of eleven thousand eight hundred eighty two dollars and twenty six cents ($11,882.26) minus the above credits of four thousand seven hundred fifty nine dollars and five cents ($4,759.05) equaling a subtotal of seven thousand one hundred twenty three dollars and twenty one cents ($7,123.21).

60. The original judgment against the Respondent should be increased by the following:

a. If Petitioner is able to retain the marital residence in Ogden Utah, Respondent should pay the payments he was ordered to pay under the temporary order on the Ogden home mortgage for August, 1998

and September, 1998 in the total amount of three thousand four hundred ninety dollars and eighty two cents ($3,490.82);

b. If Petitioner is able to keep the martial residence in Ogden, Utah, Respondent should pay the late charges each month on the mortgage on the marital residence in Ogden, Utah for his failure to keep the mortgage current from June 1, 1997 through October 31, 1998 as ordered in the temporary order in the total amount of two thousand seventy one dollars and sixty two cents ($2,071.62);

c. The Petitioner's share of the equity in the Montana property, which is eight thousand dollars ($8,000.00);

d. The Petitioner's attorney's fees of twelve thousand seven hundred dollars ($12,700.00);

e. The Petitioner's costs of five hundred ninety three dollars and twelve cents ($593.12);

f. The Petitioner's expert witness fees of two thousand three hundred sixty two dollars and fifty cents ($2,362.50); and OCA

g. The Petitioner's share of the dental equipment in the amount of twenty thousand dollars ($20,000.00).

h. If Petitioner is able to keep the marital residence in Ogden, Utah, one-half of the parties' equity in the marital residence in Ogden, Utah existing at the time her ownership in that home is confirmed. This confirmation will be made by the resolution and dismissal of pending or threatened foreclosure proceedings against that residence. The equity will be the difference between the appraised value of $268,000.00 as found in paragraph 5 above and the total amount owed on the home, including but not limited to interest, taxes, principal on the mortgage and fees, including but not limited to attorney's fees, penalties and court costs.

61. Petitioner's total judgment after adding all enhancements is fifty six thousand three hundred forty one dollars and twenty seven cents ($56,341.27) minus one-half of the marital residence on Ogden, Utah as calculated in paragraph 60h above. If Petitioner is not able to keep the marital residence in Ogden, Utah, Petitioner's total judgment is fifty thousand seven hundred seventy eight dollars and eighty three cents ($50,778.83).

62. The property taxes for the marital residence in Ogden, Utah are considered above in Paragraph 20 and are to be treated separately from and in addition to the judgment described in Paragraphs 58 through 61 above.

63. The total judgment in favor of the Petitioner as well as the property taxes for the marital residence in Ogden, Utah shall constitute a lien against Respondent's dental practice. If Respondent were to sell the dental practice before the judgment in favor of Petitioner is paid, the amount due to Petitioner will be paid out of the sale. Petitioner is granted a security interest in the dental equipment currently held by Respondent and Respondent shall immediately sign all documentation necessary to perfect Petitioner's security interest in the dental equipment.

64. Respondent will pay the judgment to Petitioner described in Paragraphs 58 through 61 above in monthly installments as he is able as follows:

a. In no event shall Respondent pay less than four thousand two hundred and twenty dollars ($4,220.00) a month for the first five years and five thousand two hundred twenty thousand dollars ($5,220.00) a month thereafter to Petitioner until all of the above judgment plus ongoing support due to her is paid in full.

b. When the oldest minor child is emancipated, the parties will refigure the appropriate amount of child support under Paragraph 30 above. However, Respondent will continue to pay Petitioner in the same amount he would pay for three minor children. The difference between the adjusted child support and the amount actually paid will be considered a payment toward the judgment Respondent owes to Petitioner under the Divorce Decree.

c. When child support is no longer due, Respondent's payment to Petitioner will continue in the same amount as support for three children until he has paid the entire judgment in full. This entire child support amount will be considered a payment towards the Petitioner's judgment against Respondent.

d. If alimony decreases, Respondent shall continue to pay the full amount of alimony ordered by this Court as a payment on the judgment until all of the judgment ordered against Respondent is paid in full. All amounts paid by Respondent to Petitioner shall accrue interest at the rate provided for by Utah Code Annotated §15-1-1 for post judgment interest from the date of entry of the Decree

and from the date of any prior judgments. Petitioner is also entitled to interest on past due support as provided by Utah law.

CONCLUSIONS OF LAW

The parties were previously granted a Decree of Divorce in an Order of Bifurcation.

Under Utah Code Annotated § 30-3-5(8) and Johnson v. Johnson, 855 P.2 250 (1993), this court has the discretion to award non-terminable alimony based on the interests of justice and pursuant to the court's equitable powers.

All issues between the parties will be ordered in accordance with the Findings above.

DATED this 17th day of ~~April~~ May 1999.

Judge Stanton Taylor

Approved as to Form

Dean C. Andreasen 4-19-99
Dean Andreasen
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **FINDING OF FACT AND CONCLUSION OF LAW** was mailed, postage prepaid, on the _____ day of March, 1999 to:

Dean C. Andreasen
CLYDE, SNOW, SESSIONS & SWENSON
Attorneys for Respondent
201 South Main Street, 13th Floor
Salt Lake City, UT 84111

_____

Tab B

Steve S. Christensen (6156)
Attorney for Petitioner
Eagle Gate Tower, Suite 1160
60 East South Temple
Salt Lake City, Utah 84111-1004
Telephone: (801) 322-0591
Facsimile: (801) 322-0592

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH

CHERISE ROUNDY, Petitioner, vs. V. CRAIG BARNEY, Respondent.	**DIVORCE DECREE** Civil No. 974900793 DA Judge Stanton M. Taylor

Petitioner's Complaint for Divorce was heard before the court in trial on October 27, 1998 and October 29, 1998, the Honorable Stanton M. Taylor, District Judge presiding. Petitioner was present and represented by her counsel, Steve S. Christensen; Respondent was present and represented by his counsel, Dean Andreasen.

The court having reviewed all of the exhibits admitted by both Petitioner and Respondent, having reviewed the law applicable to this matter, having heard argument from both counsel, and having previously entered its Findings of Fact and Conclusions of Law, now enters its:

DECREE OF DIVORCE

The Stipulation of the parties is approved and the parties are ordered to comply with such stipulation as follows:

1. The parties are awarded joint legal custody of the minor children. Petitioner will have the primary physical custody, care and control of the minor children, subject to reasonable rights of visitation of the Respondent described as follows:

   a. Petitioner will always have the children during the first half of the Christmas vacation including Christmas day. The Respondent will have the second half of the Christmas vacation including New Years Day. This way the children will not have to travel on Christmas Day.

   b. Petitioner will always have the children during the Easter Holiday and during the Utah Spring Break.

   c. The Respondent will have the children during the UEA break that they have from school in the fall each year. He will also have the children for Labor day and Memorial Day.

   d. Petitioner will always have the children for the 24th of July, as they do not celebrate this in Montana.

e. Respondent will always have the children during the week of the 4th of July. He has the option to use some of his summer vacation during that time. He has a total of four weeks he can spend with the children during the summer. Basketball camps in Montana will be taken into consideration as these are important to the children.

f. Respondent will have the children for Thanksgiving during the ODD years.

g. Petitioner will have the children for Thanksgiving during the EVEN years.

h. The parties will try to cooperate with one another in the summer months and try to get the children to participate in extended family reunions whenever possible. Trading July 4th or July 24th to allow for family reunions will be acceptable. If a family reunion conflict exists in the summer, the parties will alternate taking the children: Petitioner will have the children during the 1st conflict time and Respondent will have the next, etc.

i. Respondent has the option of scheduling his visitation on 3-day weekends if it works into his schedule, so he will be able to see the children longer on his trips to Utah. Petitioner has second option on

3-day weekends (except Labor Day and Memorial Day, which Respondent already has.) If Cherise desires to have the children on one of these minor holiday weekends, for a special event, then Respondent will try to arrange a different time to see the children that month. Petitioner will let Respondent know of any such problems as soon as possible. Respondent will try to be as flexible with these minor holiday changes as his work schedule permits.

j. On months that do not have minor holidays, Petitioner will permit the children to miss one day of school on a Monday to visit with Respondent, provided he calls the school and arranges it with them. Respondent must also have the children bring their schoolwork with them so they can return to school on Tuesday and not be behind.

k. Respondent will provide a proposed summer schedule by the prior April 15 which will give Petitioner time to arrange any desired changes. Petitioner will have until April 30 to reply to the summer schedule. The parties will submit any dispute they cannot resolve regarding visitation to mediation with the parties sharing the costs thereof initially. The ultimate cost of mediation may be allocated differently by the court.

l. Annie will arrange her own exceptions to this schedule with Respondent. The other children will also have the right to work things out with Respondent if there are conflicting school activities.

m. Respondent will try to give Petitioner visitation schedules at least six months but not more than one year in advance.

n. Petitioner will always have two weeks to agree to or to suggest changes to any visitation schedule Respondent sends her. This two week time period will begin from the day Petitioner first receives the visitation schedule by certified mail. If Petitioner does not pick up the certified mail, it will be presumed that she received it five days after Respondent's mailing is post marked.

o. Family emergencies, Weddings, Funerals, etc. will take precedence over the visitation schedule. Respondent and Petitioner will work together to allow each other as much notice as possible for these things. Respondent will make all changes in the visitation schedule in writing 45 days in advance. Petitioner will have two weeks to reply to suggested changes.

p. The parties shall implement, as applicable, the advisory guidelines set forth in Utah Code Annotated §30-3-33, a photocopy of which is attached as Exhibit 'B' to the Findings of Fact.

2. Each party is awarded the personal property presently in his/her possession, except that the Respondent will be awarded the hot tub, together with the electrical box, stairs and accessories for the hot tub, installed at the Ogden property.

3. The parties' daughter, Angelina Cherise Barney, age 17, is driving one of the parties' vehicles. The parties will give title to such vehicle to their daughter, Angelina, within thirty days of the signing of this order.

4. The Respondent is ordered to provide a health insurance program for the minor children of the parties covering hospital, doctor, medical expenses incurred by the children. The cost of this insurance will be evenly divided between the parties. Further, the parties is ordered to each pay one-half of all out-of-pocket reasonable and necessary medical expenses paid to or for a provider other than Respondent, not covered by said insurance.

5. Each party is awarded the vehicle in his/her possession.

6. The base child support shall not be reduced by 50% for time periods during which extended visitation occurs for at least 25 of any 30 consecutive days even though the statue allows for this reduction.

7. A mutual restraining order shall be entered enjoining the parties from harassing, abusing or annoying the other party.

LIFE INSURANCE

8. Respondent is ordered to maintain the two hundred fifty thousand dollar ($250,000.00) life insurance policy on his life now in effect for the benefit of the Petitioner and the minor children of the parties, naming the Petitioner as the beneficiary. After child support terminates, Respondent is ordered to maintain life insurance for the benefit of Petitioner naming Petitioner as the sole beneficiary of said insurance policy in the amount of one hundred twenty five thousand dollars ($125,000.00) during the period of time Respondent owes Petitioner alimony.

DENTAL PRACTICE

9. Respondent is awarded his dental practice and the assets and property associated therewith subject to the lien of Petitioner pursuant to paragraph 45 below.

10. One-half of the equity of the dental practice is awarded to Petitioner in the amount of twenty thousand dollars ($20,000.00).

REAL PROPERTY

11. The Montana duplex is awarded to Respondent.

12. One-half of the equity of the Montana duplex is awarded to Petitioner in the amount of eight thousand dollars ($8,000.00).

13. The marital residence in Ogden, Utah will be awarded to Petitioner in the event that she may be able to save the home from foreclosure. If any liens for marital debts are attached to the home, Respondent is ordered to hold Petitioner harmless from such liens on the marital residence in Ogden, Utah. If Petitioner pays any marital debts secured by the marital residence, Respondent is ordered to indemnify Petitioner.

IRA

14. The IRA of the parties in the amount of three thousand six hundred dollars ($3,600.00) held at Piper Jaffrey under account #522-12670-220 is marital property. Respondent is ordered to pay one half of said IRA account to Petitioner in the cash amount of approximately $1,800.00.

DEBT DIVISION

15. Respondent is ordered to pay all of the parties' past due Internal Revenue Service debt for 1995 in the amount of three thousand five hundred fourteen dollars ($3,514.00) and for 1996 in the amount of sixty two thousand three hundred twelve dollars ($62,312.00), to hold Petitioner harmless therefrom and to indemnify Petitioner for any payment she makes thereon. Each party is responsible for any tax debt on income reported on such separate returns filed by him or her for the years 1997 and thereafter.

16. Respondent is ordered to pay all of the parties' past due state tax debts for the year 1996 in the amount of nine thousand six hundred fifty seven dollars ($9,657.00), to hold Petitioner harmless therefrom and to indemnify Petitioner for any payment she makes thereon. Each party is responsible for any tax debt on income reported on such separate returns filed by him or her for the years 1997 and thereafter.

17. If Petitioner is able to keep the marital residence in Ogden, Utah, Respondent is ordered to pay current all real property taxes for all years prior to and including 1998, in the amount of eighty eight hundred dollars ($8,800.00) plus interest after October 31, 1998, in order to enable Petitioner to refinance such property, consistent with the court's order from the January 11, 1999 hearing in this case. If Petitioner is not able to retain the marital residence in Ogden, Utah, Respondent is ordered to hold Petitioner harmless against collection of any delinquent real property taxes through 1998 plus interest on the marital residence in Ogden, Utah and is ordered to indemnify Petitioner for any payments she makes towards such taxes and interest.

18. Respondent is ordered to pay all marital debt incurred prior to April 1997 not specifically addressed under paragraphs 14 through 16 above, to hold Petitioner harmless therefrom and to indemnify Petitioner for any payment she makes thereon.

19. Respondent is ordered to pay debts separately incurred by him after March, 1997 in addition to the other debts assigned to him in this Decree.

20. Respondent is ordered to make payments of three thousand dollars ($3,000.00) per month to the IRS and the State of Montana in order to resolve unpaid marital obligations.

21. Except as otherwise ordered in this Decree, Petitioner is ordered to pay all debts separately incurred by her since her bankruptcy in 1998.

22. The parties will bear his or her own debt for the vehicle each is driving.

23. The parties are ordered to pay the mortgages on the real property awarded to him or her except as set out in other paragraphs in this decree.

24. The order that Respondent pay marital debt on behalf of the Petitioner is made by way of further support and maintenance for the Petitioner and is not to be considered a property settlement.

CHILD SUPPORT

25. Respondent is ordered to pay child support for the parties three minor children: Angelina Cherise, 12/21/82; Sandin Craig, 9/18/85; and Fabione Sadie Marcella, 12/19/87.

26. Respondent is ordered to pay child support of $2,220.00 a month, initially, calculated as follows:

a. Using a sole custody worksheet, if Petitioner has a gross monthly income of $893.00 and Respondent has the highest gross monthly income on the table

of $10,000.00, child support would be $1,660.00 or approximately 16.6 percent of the highest gross monthly income on the child support table for Respondent. Extrapolating this percentage to Respondent's actual gross monthly income of $13,500.00 results in child support of approximately $2,220.00 per month ($13,500.00 x 16.6 percent). Child support shall be recomputed using the same methodology when there is a change in circumstances under Utah law.

b. Child support will continue for a child until the child attains the age of 18 years or graduates from high school with his or her regular class, whichever is later.

27. Respondent is ordered to pay his child support obligation in no more than two equal installments no later than the 5th and 20th days of the month.

28. Respondent is ordered to pay any monthly transaction fee for income withholding of his child support obligation by Office of Recovery Services.

ALIMONY

29. Respondent is ordered to pay alimony of two thousand dollars ($2,000.00) per month for five years.

30. Respondent is ordered to pay income taxes for state, federal and self employment on his entire income of thirteen thousand five hundred dollars ($13,500.00) a

month, without any deduction for alimony, in addition to his obligations for marital debts and child support ordered above.

31. After five years from the date of the entry of the Divorce Decree, Respondent is ordered to increase his alimony payments to a total alimony payment of three thousand dollars ($3,000.00) per month.

32. Based upon the courts' memorandum decision dated January 28, 1999, a portion of the alimony awarded to the Petitioner will not terminate if Petitioner remarries or cohabits. In the event of marriage or cohabitation by Petitioner, Respondent is ordered to pay alimony as follows:

a. If Petitioner remarries or cohabits for the first time, before five years from the date the Divorce Decree is entered, the Petitioner's alimony will immediately be lowered from the amount of alimony provided in paragraph 29 above to one thousand five hundred dollars ($1,500.00) a month. After five years from the date such Decree is entered, Petitioner's alimony will be raised to $2,000.00 per month.

b. If Petitioner remarries or cohabits for the first time after five years from the date the Divorce Decree is entered, the Petitioner's alimony will be lowered from the amount of alimony provided above in paragraph 31 above to the amount of $2,000.00 per month.

33. The alimony provided in paragraphs 29, 31 and 32 will continue until April 30, 2021, this being the length of the marriage of the parties from the date of divorce. Regular and non-terminable alimony will terminate on the death of either party.

TAX EXEMPTIONS

34. The Respondent will be awarded the right to claim the children as tax exemptions each year so long as Respondent is current on all obligations to Petitioner and his children under this Divorce Decree.

ATTORNEY'S FEES

35. Petitioner is awarded her attorney's fees, expert witness fees and costs requested at trial as follows:

a. Petitioner's attorney's fees requested at trial were twelve thousand seven hundred dollars ($12,700.00); and in addition

b. Petitioner's expert witness fees are one thousand five hundred dollars ($1,500.00) for the dental practice appraiser, five hundred sixty two dollars and fifty cents ($562.50) for trial preparation and testimony by Petitioner's accountant and three hundred dollars ($300.00) for J. F. Pingree the accountant who consulted with Petitioner's attorney in preparing this case for trial; and in addition

c. Petitioner's costs are five hundred ninety three dollars and twelve cents ($593.12) for deposition transcripts, Exhibits and court fees.

36. Petitioner's Motion for Additional Attorney's Fees at Trial for fees and costs of $1,492.00 included in her attorney fee affidavit which was submitted prior to the last day of trial is denied. Attorney's Fees for post trial matters is denied in the amount of $14,400.00, including her fees for preparation of the briefs, which were requested by the court on the issue of non-terminable alimony, for her preparation of the Findings and Decree and for the hearing on the Findings.

VISITATION

37. The children may travel to their father's home for visitation by bus as long as such travel is made without causing the children to have to transfer buses.

38. Respondent may supply the court with alternative travel proposals.

39. Respondent is ordered to pay for all visitation travel expenses.

JUDGMENT

40. Respondent will be allowed the requested offsets for past due alimony and attorney's fees to Petitioner's judgment against Respondent in the prior amount of eleven thousand eight hundred eighty two dollars and twenty six cents ($11,882.26) as follows:

a. All of Respondent's attorneys fees of two thousand five hundred and fifty dollars ($2,550.00) for the May 18, 1998 hearing.

b. Petitioner's share of the medical expenses for the children incurred prior to October 29, 1998 in the amount of one thousand nine dollars and five cents ($1009.05).

c. The Petitioner's agreed share of the appraisal paid by Respondent in the amount of two hundred dollars ($200.00).

d. Respondent's one thousand dollar ($1,000.00) payment in December, 1997 towards the judgment against him.

e. If Petitioner is able to keep the marital residence in Ogden, Utah, one-half of the equity in the marital residence in Ogden, Utah existing at the time her ownership in that home is confirmed. This confirmation will be made by the resolution and dismissal of pending or threatened foreclosure proceedings against that residence. The equity will be difference between the appraised value of $268,000.00 as found in paragraph 5 of the Findings of Fact and the total amount owed on the home, including, but not limited to interest, taxes, principal on the mortgage and fees, including but not limited to attorney's fees, penalties and court costs.

41. The above credits are four thousand seven hundred fifty nine dollars and five cents ($4,759.05) plus Respondent's share of the equity of the marriage residence in

Ogden, Utah, referred to above in paragraph 40e, if applicable. After the adjustment, the prior amount of the Petitioner's judgment of will be adjusted from eleven thousand eight hundred eighty two dollars and twenty six cents ($11,882.26) to a new amount of seven thousand one hundred twenty three dollars and twenty one cents ($7,123.21) minus the Respondent's share of the equity of the marriage residence in Ogden, Utah, referred to above in paragraph 40e, if applicable.

42. In addition to adjusted judgment against the Respondent, Respondent is ordered to pay and Petitioner is awarded an additional judgment for the following:

a. If Petitioner is able to retain the marital residence in Ogden Utah, Respondent will pay the payments he was ordered to pay under the temporary order on the Ogden home mortgage for August, 1998 and September, 1998 in the total amount of three thousand four hundred ninety dollars and eighty two cents ($3,490.82);

b. If Petitioner is able to retain the martial residence in Ogden, Utah, Respondent shall pay the late charges each month on the mortgage on the marital residence in Ogden, Utah for his failure to keep the mortgage current from June 1, 1997 through October 31, 1998 as ordered in the temporary order in the total amount of two thousand seventy one dollars and sixty two cents ($2,071.62);

c. The Petitioner's share of the equity in the Montana property, which is eight thousand dollars ($8,000.00);

d. The Petitioner's attorney's fees of twelve thousand seven hundred dollars ($12,700.00);

e. The Petitioner's costs for trial of five hundred ninety three dollars and twelve cents ($593.12);

f. The Petitioner's expert witness fees of two thousand three hundred sixty two dollars and fifty cents ($2,362.50); and

g. The Petitioner's share of the value of the dental practice in the amount of twenty thousand dollars ($20,000.00).

43. Petitioner is awarded a total judgment after adding all enhancements of fifty six thousand three hundred forty one dollars and twenty seven cents ($56,341.27) minus Respondent's share if any as defined above in paragraph 38e of the equity in the marital residence in Ogden, Utah.

44. The property taxes for the marital residence in Ogden, Utah are considered above in Paragraph 17 and are to be treated separately from and in addition to the judgment described in Paragraphs 40 through 43 above.

45. The total judgment in favor of the Petitioner as well as the property taxes for the marital residence in Ogden, Utah shall constitute a lien against Respondent's

dental practice. If Respondent sells the dental practice or any part thereof before the judgment in favor of Petitioner is paid, the amount due to Petitioner is ordered to be paid out of the sale. Petitioner is granted a security interest in the dental equipment currently held by Respondent and Respondent is ordered to immediately sign all documentation necessary to perfect Petitioner's security interest in the dental equipment.

46. Respondent is ordered to pay the judgment to Petitioner described in Paragraphs 40 through 43 above in monthly installments as he is able and at least in the following amounts:

a. When the oldest minor child is emancipated, the parties are ordered to refigure the appropriate amount of child support under Paragraph 26 above. However, Respondent is ordered to continue to pay Petitioner in the same amount he would pay for three minor children. The difference between the adjusted child support and the amount actually paid will be considered a payment toward the judgment Respondent owes to Petitioner under the Divorce Decree.

b. When child support is no longer due, Respondent is ordered to make payments to Petitioner in the same amount as support for three children until he has paid the entire judgment in full. This entire

child support amount will be considered a payment towards the Petitioner's judgment against Respondent.

c. If Petitioner remarries or cohabits, resulting in decreased alimony, Respondent is ordered to continue to pay the same amount he was ordered to pay for alimony as though the cohabitation or remarriage did not occur. However, the difference between the amount paid and the alimony ordered by the court under this Decree will be considered a payment towards the Petitioner's judgment against Respondent.

d. In no event shall Respondent pay less than four thousand two hundred and twenty dollars ($4,220.00) a month to Petitioner in support and judgment payments for the first five years after the signing of the Decree and five thousand two hundred twenty dollars ($5,220.00) a month to Petitioner in support and judgment payments thereafter until all of the above judgment plus ongoing support due to her is paid in full.

e. All amounts paid by Respondent to Petitioner shall accrue interest at the rate provided for by Utah Code Annotated §15-1-1 for post judgment interest from the date of entry of the Decree and from the

date of any prior judgments. Petitioner is also entitled to interest on past due support as provided by Utah law.

47. The parties shall execute such documents as may be necessary to transfer the property as awarded by the Court to the party entitled thereto.

DATED this 17 day of ~~April~~ May, 1999.

BY THE COURT:

Judge Stanton M. Taylor
District Court Judge

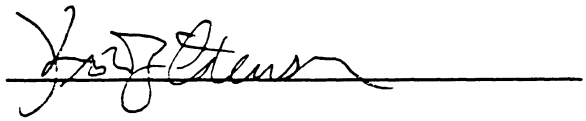
Approved as to form

Dean C. Andreasen 3-7-99
Dean Andreasen
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DIVORCE DECREE** was mailed first class, postage prepaid on the 30 day of April 1999 to:

Dean Andreasen
CLYDE, SNOW, SESSIONS & SWENSON
Attorneys for Respondent
201 South Main Street, #1000
Salt Lake City, UT 84111



Tab C

IN THE SECOND JUDICIAL DISTRICT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

FEB 01 1999

CHERISE ROUNDY, Petitioner, vs. V. CRAIG BARNEY, Respondent.	MEMORANDUM DECISION Case No. 971900793

1999 FEB -1 P 12:50 SECOND DISTRICT COURT

Following a trial on October 29, 1998, the court took under advisement whether nonterminable alimony was appropriate in the instant circumstances. Both sides have briefed the issue.

The state legislature clearly provided that alimony could continue beyond the remarriage of the receiving spouse, if the divorce decree so specifically provides. *Utah Code Annotated*, § 30-3-5(8). The availability of nonterminable alimony has likewise been recognized by the Utah Court of Appeals. *See Johnson v. Johnson*, 855 P.2d 250 (1993). In the interests of justice and pursuant to the court's equitable powers under § 30-3-5, U.C.A., the court finds that the instant case justifies the award of nonterminable alimony. *See Johnson* at 252.

The decision to award permanent alimony is based on many relevant factors. The court makes the following findings: Petitioner is in need of alimony. Respondent has the ability to pay alimony. Respondent's earning capacity was greatly enhanced

through the efforts of both spouses during the marriage. Petitioner supported respondent during dental school. Petitioner, likewise, supported respondent during the specialized training after dental school. Petitioner and respondent worked jointly to establish the dental practice. Petitioner dedicated her inheritance of $125,000.00 to the marriage, which amount has been entirely consumed. There are only minimal marital assets to be divided. Petitioner is in a precarious financial position. Petitioner has a minimal earning capacity. Petitioner has no marketable skills. Petitioner did not pursue additional training or work experience in order to support respondent and to raise their children. The marriage had a duration of twenty-three years. If petitioner were to remarry, she will have essentially zero financial security to reflect her twenty-three years of dedication to respondent and to their family, constituting a restraint on the freedom of petitioner to remarry. Petitioner and respondent were accustomed to a high standard of living. Although the court considers respondent's ability to provide support (as per § 30-3-5(7), U.C.A.), the court specifically does not consider the value in respondent's professional degree and the good will in his dental practice.

Accordingly, the court finds that alimony, a portion of which will be nonterminable, is justified. Respondent will pay alimony in the amount of $2,000.00 per month. After five years, the alimony will increase to $3,000.00 (based on respondent's

increased ability to pay once tax responsibilities are satisfied). If petitioner remarries, the alimony will be decreased to $1,500.00, if the five years have not yet passed from the entry of judgment, and to $2,000.00, if and when five years have passed. The later amount is nonterminable. The court will have continuing jurisdiction to modify alimony based on a substantial material change in circumstances not freseeable at this time.

The ruling of the court on October 29, 1998 is hereby amended, as necessary, by this decision. Mr. Christensen will please prepare an appropriate order.

Dated this 28 day of January, 1999.

Stanton M. Taylor, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 1st day of ~~January~~ Feb., 1999, I sent a true and correct copy of the foregoing ruling to counsel as follows:

Steve S. Christensen
HENROID NIELSEN & CHRISTENSEN
Eagle Gate Tower, Suite 1160
60 East South Temple
Salt Lake City, Utah 84111-1004

Dean C. Andreason
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, Utah 84111-2216

MK Dixon
Deputy Court Clerk

Tab D

IN THE SECOND JUDICIAL DISTRICT COURT

FOR WEBER COUNTY, STATE OF UTAH

CHERISE ROUNDY BARNEY,	:	Case No. 974900793 DA
Plaintiff,	:	
v	:	JAN 11 1999
VERMON CRAIG BARNEY,	:	
Defendant.	:	

PARTIAL TRANSCRIPT OF HEARING HELD OCTOBER 29, 1998

BEFORE

THE HONORABLE STANTON M. TAYLOR

ORIGINAL

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
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801-567-1157

APPEARANCES

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For the Defendant:

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801-322-2516

and then decide if the children need that expense. I believe the children in this case do need that expense. The parties have created those needs including housing, food, and the other expenses that they have acquired a life style for and that amount will be a short term amount of less than seven years.

And, your Honor, I would indicate to the Court, by Ms. Roundy having real property, she is able to take that as a tax deduction which gives her $600 a month in savings. So whatever the concern about having expensive housing, her taxes would go up by that amount by not having that housing and I think that does offset any concern of the reasonableness of the housing. It's not, the standard is not adequate housing, it's housing at the level that these parties are used to living. Thank you for your attention.

THE COURT: We'll be in recess for about five minutes.

(Whereupon a recess was taken.)

THE COURT: I guess if it was easy, you wouldn't be here, would you? The problem is that I didn't bring my baby cutting sword. What is it that W.C. Fields said, "All things considered, I'd rather be in Philadelphia". I'm going to go through this and it's going to take us a little time because I do have some questions as we go along.

To make an observation to begin with. I am finding and I'm sure this is not going to be any great shock to anyone, that the parties and their standard of living was an extremely extravagant one. In fact, I don't recall ever seeing a case where people would go through the amount of money that you folks have gone through and not have anymore to show for it than what you have to show for it. I mean it's a shame, it's a, I don't know how you did it. I'm not sure that you know. But to have gone through the kind of gross, I mean here you are grossing in excess of $400,000 a year and whether we find your overhead was 60% or 50% that's still means, you know, somehow you're burning up $160 to $180,000 and not even paying taxes and not buying anything of substance. I mean you bought two homes. You bought one here in Ogden, but you don't have any substantial equity in it, in fact, the default debts probably far exceed any equity that you have in the house. And you have a little equity in the one up in Montana but that's a shame, not to mention $125,000 that was the inheritance and the Court, by the way, finds in fact that that was commingled. It became a martial asset and was blown right along with all of the rest of the money that was coming in. I feel really bad about this because I don't think there's anyway we can really do justice. Regardless of what I do, I don't think there is anyway that

I can do justice just based upon the fact that you folks have blown an opportunity to invest. You ought to be millionaires. You know, with the kind of money you were making, you ought to be millionaires. Gees, how many people have an opportunity of getting $125,000 cash handed to them? And to blow it and not have anything to show for it, that's, I don't understand. I don't understand. Unfortunately, you are going to have to suffer by reason of that.

Now when we are considering both child support and alimony, it's very difficult for me to determine what kind of a standard of living that, obviously you were living so extravagantly that there is no way that there's going to be money that you are going to be able to maintain anywhere near the kind of standard of living that either one of you were living before. Just can't do it. There's not money there to do it with.

Well, let's get started at the beginning of these things and see if I can kind of deal with them with what we've got. The Court, of course, had previously granted the divorce so I'm not going to have to be concerned about that. We bifurcated that issue. That the Court finds that the stipulation of parties concerning the custody of the children and the visitation schedule, I find that is reasonable and order that that be incorporated into the

findings of decree. I'm going to encourage both of you, I think both of you are going to go away feeling dissatisfied and upset. Please, be upset at me, that's okay. That's what they pay me my magnificent salary for. But please don't take it out on your kids. You know, they are the real victims. You two, I suppose, get what you deserve. You know, you made the choices you made but please, understand those kids have to feel good about both of you in order for them to feel good about themselves. If you want your kids to go through a real identity crisis, tear down the other parent in front of them because that's the quickest way in this world I can think of doing it. You know, you're going to have to make a decision which is most important to you, your love of your children or your anger and hate of each other. If you don't give a damn about the kids then keep tearing each other down. That's a good way to end up with kids who are having problems. So please don't do that. Please consider the love of your children.

The Court awards each party the personal property presently in their possessions as was stipulated between the parties with one exception. I think that was the hot tub. The hot tub goes to Dr. Barney.

In finding that the $125,000 became marital property and was flittered away, that the Court also finds that, you know, normally the income tax that would have

been a debt of the parties but somehow it only seems fair to me that the doctor should pay that debt. So, he has the tax debt.

The IRA, what I would prefer to say, you know, each one of them is entitled to half of it. The concern I have is that if they cash it out there is going to be an additional tax liability and I think we want to avoid as much of the taxes as we possibly can. And if there is some way, is it in the Doctor's name at the present time?

MR. ANDREASEN: It is. But under the Internal Revenue Code it can be transferred to her tax free. What she does with it from there, of course, is her decision.

THE COURT: That would be to her decision.

MS. ROUNDY: May I say something? I told my lawyer not to mention the IRA because it's not our money. It's my in-laws money and I don't want any of it. It's their money. So, just leave it for them.

THE COURT: All right. No. Divide it. Divide it. And let's do it so that it is a tax free thing so that she gets her share and then she can do with it what she wants to do. And I suppose if she wanted to give it back to his parents, she could do that.

Okay. The Court, of course, is going to award to him the dental practice. I think that makes sense. You're going to have to remind me. There was a specific amount of

equity in the property in Montana.

MR. ANDREASEN: $206 minus 190, so approximately $16,000.

THE COURT: $16,000? Okay. All right. We will award that property to him since it's up there. I wonder-- I'll come back to that.

The Court finds in accordance with my previous ruling that the value of the practice would be $40,000. I recognize that there is some problems with that. I really do have some heartburn over it. So that everybody will understand that I do have some sympathy for the fact that the petitioner in this case had spent 23 years of her life helping to develop the practice, supporting him so that he would be able to do the development the practice even to the extent of the $125,000 that either went to expenses or assisted in building up the practice. And then to say the only thing she would be entitled to is half the physical assets of the business, I really do have some problems with that. But, I think I'm bound by what the Supreme Court has said and I, for a long time, have felt like, that the value of his education ought to be a marital asset. But, once again, the Supreme Court don't agree with me and I'm bound by the law as it is, not as I would necessarily like it to be. So the Court will divide that $20,000 to each. Well, rather than saying to each at this point, I'm going to say

the value of the asset is $40,000.

Now the Court would award to each party the vehicles that they have in their possession subject to the debts. And the van, as I understood, the daughter is now driving that. Is that the 22 year old that's away from home?

DR. BARNEY: Your Honor, the van was repossessed.

THE COURT: Oh, it was repossessed. That's right.

DR. BARNEY: It's a 1990 Dodge Dynasty that she is driving, yes.

THE COURT: Pardon me?

DR. BARNEY: A 1990 Dodge Dynasty. That's what she is driving. That's the other vehicle.

THE COURT: Is there a debt on that?

DR. BARNEY: No, there is not.

THE COURT: Free and clear.

DR. BARNEY: A $1,400 car.

THE COURT: Do you have any problem with her keeping that? Okay. Then we'll let each of you keep your own cars and pay for them and we'll let the daughter keep the other car.

The Court will allow as offsets the things that have been stipulated to; the $1,000 payment, the appraisal, the insurance premiums, medical costs for the kids.

And on the attorney's fees on the contempt, I think where the commissioner made that specific finding and recommendation and the Court, in view of all of the circumstances, feels like that was probably an appropriate recommendation so the Court will affirm that and allow that also as an offset against the judgment which he had granted to the petitioner on the back due support. I think it was back due alimony, wasn't it?

MR. CHRISTENSEN: Yes.

THE COURT: All right. The difficult issue and that's the support and alimony.

MS. ROUNDY: What does that leave on the judgment then?

THE COURT: Well, let's total the whole thing up when we get to the end because there are going to be some other things back and forth because we haven't dealt with the attorney's fees, your request for attorney's fees on the total hearing and in view of the cash situation of the parties I am going to award some attorney's fees and we'll get to the amount in a little while but it would be my intention to add that to the previous judgment along with some other things that I think are appropriate there. And while I'm thinking about that specific issue, the Court is granting the petitioner a lien against the dental practice for the amounts of the judgment which I think will deal

with the bankruptcy issue.

Let me ask a question just in the interest of information. And I suppose I could get this if I went to the exhibits. The respondent is encouraging the Court to go with the $1,660 permanent support obligation. Presumably that would be the three children and that would be based upon, is $1,660 based upon the maximum figure on the schedule or is there some extrapolation it's imputed on?

MR. ANDREASEN: No, it's based upon $10,000 of gross income from him, minimum wage for her.

THE COURT: I see. Okay.

On the visitation and travel for visitation, that is the responsibility of the respondent and buses are okay.

Once again, the difficult part relates to the evaluation of what would be an appropriate amount of child support and alimony. The Court believes that the maximum would probably not be an appropriate figure, the $1,660. So, what I've done is extrapolate it. And I figured that $1,660 support for $10,000 figures out at about 16%. In figuring his income times the 16%, I come up with a figure of $2,220 child support, and once again that's just the extrapolation. We'll follow the same formula when the next child becomes of age. In other words we would go back and figure the $10,000 and then figure 16% based upon the same

application for two children instead of three and then one child so they can kind of have the formula. The Court is basing that figure on a monthly income of $13,500 which is based on a gross net of $162,000.

Now, I have to tell you that the Court was somewhat impressed by one of the proposals of the petitioner which related to decreases in some of the expenses that have been forecast for previous years, some decreases in travel expense and education expense and automobile expense. The Court did not factor in the requested depreciation because I think there is an offsetting cost of the purchase of new equipment on an ongoing basis from the income that's available. I have not added those amounts to the $162,000, but what I have done is assumed in some of the subsequent figures that he would have more disposable income to pay amounts that I'm going to order for him to pay. So the basis for the $2,220 was $13,500 plus minimum wage imputed to petitioner.

In figuring alimony the Court is making this specific finding that that the petitioner has a real need for alimony to support her and the Court recognizes that the doctor does not have the ability to support her to the extent that they were living previously to their separation. But nonetheless, that he has an obligation based upon his earning capacity to provide some degree of

security and to a degree that she would not be capable of supporting herself. So I'm finding that she has a need, that she does not have the ability to provide that for herself and that he does have some ability to provide assistance for her. In computing the alimony, once again I start out with the base of 13.5 per month and I deduct from the 13.5 the taxes that he damn well better pay on an ongoing basis. In fact, that's one of the astonishing things. I can't imagine anybody not paying their taxes. I don't understand that. So, I figure $4,855 is the tax figure for both Federal and State taxes based upon, you know, projected incomes. So, I'm deducting $4,855, which would be his tax liability which leaves an amount of $8,645. The Court recognizes that he is going to have to have to be paying on the horrendous amount of back taxes which will also include the taxes for calendar year 1998 that he hasn't been paying anything on now. So what I'm going to do is give him another deduction from the $8,645 to take into account the fact that he is going to have to pay off the IRS. I am, I am, well, I deducted $3,000 per month for that purpose and I'm convinced that he is going to have to pay at least $3,000 a month on that obligation to the IRS. That leaves an amount of $5,645 dollars and what I'm in essence doing is dividing that between the parties to kind of equalize their income. So, I'm going to

require him to pay to her the sum of $2,823 per month alimony. I'm going to require that figure for a period of five years, which would be the amount of time that it's going to take him to pay off the tax liability. At the end of the five year period, I am ordering that that sum be increased by the sum of $1,000 so that in five years he is going to pay $3,823. And that that would be a permanent alimony award.

MR. ANDREASEN: Your Honor, I must have missed a figure, I'm sorry. Where did the child support come into that computation? I must have missed that.

THE COURT: No, I didn't factor that in. I didn't. Well, back to the drawing board. Okay, back to the old drawing board. We'll start out once again with the base of $13,500. We take off this tax obligation which is $4,855, that leaves us $8,645, then we substract from that the child support obligation of $2,220 and that leaves us, if my mathematics are correct, with $6,425. Now, if we deduct from that the $3,000 that he's going to have to pay on his ongoing tax obligation, that's going to leave a balance of disposable income of about $3,425. My initial feeling was that we should at that point divide the disposable income equally. I don't think that is going to work. So, what the Court is going to do is award her a $2,000 alimony and encourage the doctor to make adjustments

to that figure taking into account the items that were raised by the petitioner in reducing travel, education, automobile expense, that sort of thing. And I feel like under those circumstances that we'll be able to pretty well equalize the income where he has an obligation of $2,220 child support and $2,000 alimony.

MS. ROUNDY: Well, why don't you subtract it from the $15,000 a month he's been making for the last two years instead of $13,500?

THE COURT: Well, let's see, where was I? Then as I was saying after a five year period when the tax responsibility will have been taken care of. The Court will order that that $2,000 increase to the sum of $3,000 and the $3,000 figure at that point would become permanent. The Court, and I don't know what the exact figures are going to be because I don't, you know, we have the judgment, the previous judgment less the offsets. And then we're going to have to include $8,000 which would be her share of the Montana property, $20,000 for her share of the practice, and the Court is finding that the request for attorney's fees and costs is a reasonable one and that the judgment will include those four figures.

On payment of the judgment, the Court is going to order that as this will be an interest bearing judgment but I don't think it would be appropriate at this point to make

it executable. I don't think we ought to execute on the practice although I am ordering that she have a lien against the practice for the amount of the judgment.

As child support is reduced by reason of children becoming emancipated, either by achieving their 18th birthday or graduating from high school with their regular class whichever occurs last, that he start paying the amount of child support reduction. In other words, I want her to still get the same amount of money but he'll be paying that against the judgment.

MR. ANDREASEN: Would you say that one more time, Judge?

THE COURT: In other words, let's assume where child support of $2,220, let's say that the child support reduces by $600 when the first child comes of age. We will continue to pay that $2,220 but the $600 will be applied against the judgment. And then the second child the same thing, the third child the same thing until the judgment is paid in full.

MR. CHRISTENSEN: Your Honor, the ultimate alimony was going to be $3,823.

THE COURT: Yes, but I neglected to factor in the fact that he was also paying out $2,220. I had forgotten to factor that in.

MR. CHRISTENSEN: Right. But that will drop off

about that same time, two years later.

THE COURT: I'm sorry?

MR. CHRISTENSEN: The child support will completely had dropped off two years after that by your adjustment. This is no longer a factor. The Court is saying the ultimate long term alimony is only going to be $3,000 in 2.3 years?

THE COURT: That's right. Have I overlooked anything?

MR. ANDREASEN: I'm sorry, your Honor.

THE COURT: Have I overlooked anything?

MR. ANDREASEN: Again, I do have a number of points of clarification that I need to ask but I don't know if you're finished or not.

THE COURT: Oh, please do. That's why I like to rule from the bench so that we can talk about it.

MR. ANDREASEN: Some standard things, let me make sure that Dr. Barney will continue to pay or to maintain the medical insurance and the parties will equally share the cost.

THE COURT: Medical insurance, equally share, yes the statutory language on the medical.

MR. ANDREASEN: Okay. The alimony will terminate upon statutory events.

THE COURT: That's right.

MR. ANDREASEN: Marital residence, what are we going to do with that?

THE COURT: Oh, yes, I forgot the residence. It's awarded to her but I don't think she's going to be able to maintain it. I feel really bad about that.

MS. ROUNDY: I don't want the house.

MR. ANDREASEN: On the practical level, your Honor, I believe although we are not being far maybe with Mr. Burgy, I think they can live there probably for a period of time free. I'm not sure that that is fair to him. But the bankruptcy, of course, will tie it up. That may allow her sufficient time to find other suitable housing.

THE COURT: That'd be nice.

MS. ROUNDY. You didn't give me a thing. You gave it all to him. (Inaudible).

THE COURT: Okay. He gets the tax deductions. He is required to maintain life insurance. I don't think $100,000 is adequate.

MR. CHRISTENSEN: I believe he has a policy of $200 or $350 in effect.

MR. ANDREASEN: $250.

THE COURT: $250? All right. Let's have her be the beneficiary of that at least until the child support ends and then half of that probably.

MR. ANDREASEN: What was your decision on the home, I'm sorry? Our proposal?

THE COURT: Well, it's awarded to her for --

(Over talking)

MR. ANDREASEN: Just a couple of other questions, I have. I believe under the case law, the Rhinehart case in particular. There needs to be a specific finding of need beyond the table. Are you making findings as to needs for the children for purposes --

THE COURT: As a matter of fact, the children have been maintained at an extremely high level and I think they have come to expect and probably deserve to be maintained at a fairly high level. I just don't feel it's appropriate to punish them anymore than they are being punished by reason of the fact of the divorce and I think he has the capability of paying child support in the increased amount and I think the increased amount is minimum to keep them going at least in an assemblance of what they've had before.

MR. CHRISTENSEN: Your Honor, --

MR. ANDREASEN: Oh, excuse me. I had a few others. The next question would be dealing the elements of the judgment. As I understood, if I understood correctly, you are adding $20,000 to the judgment for ½ of the hall, or excuse me, the dental practice.

THE COURT: That's right.

MR. ANDREASEN: $8,000 for ½ of the duplex.

THE COURT: That's right.

MR. ANDREASEN: So she's getting benefit of all of the property settlement, the assets side but he is picking up all of the tax liability?

THE COURT: Yes.

MR. ANDREASEN: Okay.

THE COURT: I think that's what I said. There were a couple of things that I considered in that. Even though the $125,000 became a marital asset, I just, and there was another factor, well, both parties have pointed the finger at the other as being the responsible party for the extravagant life style. I recognize that it probably isn't both of them but they're involved somewhat. Although, this is probably the primary responsibility for the money. That was another factor that I considered in ordering that he, you know, pick that up. I just felt like from the stand point of the equities, that ought to be his responsibility and then, of course, his ability to pay on those he's going to pay. You know, there was a lot of discussion earlier, too, about the commissioner's order concerning her having to work. I haven't made any order concerning that. I feel like she's going to have to make her own decisions about that. I think it would be great

for her to go back and get her education and try to develop some skills. The real heartburn I'm having about the whole thing is just exactly what her outburst was, you know, I'm not really getting anything. She's right. And the primary reason is because there isn't anything there to give her. That's primarily the problem. Now, they've absolutely blown away everything that they had.

Why don't you ask your attorney first and if it's something that should be brought to my attention, I'll be glad to consider it.

Those are some of the factors that the Court was considering in assigning, and assessing that responsibility.

MR. ANDREASEN: I believe the final question that I had was regarding attorney's fees. I'm not quite sure what --

THE COURT: He had filed an affidavit relating to about, as I recall, was it about $13,000 for his fees plus there was some costs of expert witnesses and that sort of thing and I think under the current state of the law that they are entitled to that. Once again it will be a part of the judgment.

MR. CHRISTENSEN: Your Honor, I think (inaudible).

MS. ROUNDY: Judge, who did you award the

attorney's fees to?

THE COURT: Pardon me?

MS. ROUNDY: Attorney fee's to?

THE COURT: Yes.

MR. ANDREASEN: Could I just observe that there was an order in place for Dr. Barney to pay the property taxes on the Ogden home which are now $8,800 in arrears.

THE COURT: Yes.

MR. ANDREASEN: I thought I told (inaudible) all about that.

THE COURT: Well, let's put it this way. I'm going to order that he hold her harmless if any claim is made against her for those fees because the commissioner did assign that responsibility to him. And I'm not going to require her to pay them. If a claim is made against her where she is required to then I'll order him to hold her harmless. And once again that wouldn't become a part of that judgment which constitutes a lien against the practice.

MR. ANDREASEN: I'm just trying to think through it quickly. Would that be a personal, those taxes only attach to the property itself. I don't believe under Utah law she would ever have any obligation personally.

THE COURT: Yes, well, if that's the case then I guess we won't have to worry about it.

MR. ANDREASEN: Okay.

THE COURT: But, once again, now see there may be a contractual responsibility and if that is the case, and if a claim were made against her, based upon the contract of sale between Mr. Burgy and them, then that would be his problem, Dr. Barney's problem. Yes.

MR. CHRISTENSEN: The Court has awarded her the property and should she lose the property only because of the $8,800 in which she is in arrears, how does the Court want to deal with that problem?

THE COURT: In other words, you feel like there is a possibility she might be able to keep the property if he were to pay to her the amount of the back due taxes?

MR. CHRISTENSEN: I don't know what her position is but I would think she would probably want to try.

THE COURT: Do you want to be heard on that?

MR. ANDREASEN: Well, I believe it's unaffordable. I mean we were talking $3,700 of monthly cost on that thing. The Court order will be in the neighborhood of $4,200 and $2,000, I mean $3,500 of $4,200 in support is going to be just for the home. It just is not affordable. The practical solution is deed it back over, let somebody else worry about the property taxes and get her into acceptable housing.

MR. CHRISTENSEN: Your Honor, I think it should

be up to her.

THE COURT: It is. And I think what he was doing is talking the practical side. Candidly, --

MS. ROUNDY: I, --

THE COURT: -- part of the extravagance is the house. I can't imagine. But, if there is a possibility of her being able to save the home through someone assisting her or something like that then I would order him to pay them.

MS. ROUNDY: Can I say something?

THE COURT: Why don't you say it to your attorney?

MS. ROUNDY: I think I can ask it better.

THE COURT: (Inaudible.)

MR. CHRISTENSEN: If your Honor is willing, I would be willing to at least pass on what she wants to say.

THE COURT: Sure.

MR. CHRISTENSEN: Her concern is that alimony will terminate if she ever remarries and she'll absolutely get nothing. And her request to the Court is that there be made some property element of the alimony to let it continue in that situation.

THE COURT: If you can tell me how to do that, counsel, I'd be delighted to. And I mean that sincerely. That's one of the problems of the case, you know, and I recognize that up front. I do. And if there was a way of

accomplishing that I would be delighted.

MR. CHRISTENSEN: Well, I mean there is a way to make that happen and that is by awarding her a marital property division at $2,000 for five years and $3,000 a month for (inaudible).

MR. ANDREASEN: You're already getting half the property and we're getting all the debt, all the taxes.

MS. ROBERTSON: I know but that's 23 years of my life.

THE COURT: That's the concern. It's not just today. What we are doing is talking ten years from now and the alimony award obviously is saying to her, you can never remarry.

MS. ROUNDY: I know it is. It's saying my life ended when I --

MR. ANDREASEN: It's Utah law.

THE COURT: Well, I understand. Well, I'll tell you what. I'll, why don't we prepare the necessary findings, conclusions, and decree and I'll hold under advisement that specific issue of how to deal with this so that she has a property interest as opposed to something else. But, I'm afraid, I'm kind of afraid that the Appellate Court's are probably going to say, you know, a rose by any other name is still a rose.

MR. CHRISTENSEN: Well, I think there are a lot

of equitable interests in this case and --

THE COURT: Well, there are but the equitable interests has been pretty well resolved by the Supreme Court contrary to your client's best interest and, you know, I really sympathize. I have to tell you, I really sympathize, but if you'll submit to me some authorities on that issue, supply counsel a copy of them, give him an opportunity to respond, I'll be glad to consider that, that particular request.

MR. CHRISTENSEN: Thank you.

THE COURT: Maybe we ought to establish some time limitations so that we can reach, you know, so there can finality because we do need to have this final and the parties get on with their lives.

MR. ANDREASEN: I'd be happy to give the first shot at the findings, conclusions, and decree, if that's acceptable.

THE COURT: Is that okay?

MR. CHRISTENSEN: My client would prefer that I try that.

THE COURT: Well, all right. Go ahead.

MR. CHRISTENSEN: All right.

THE COURT: And we'll reserve this other issue and could you say within about maybe 14 days or something submit me some authorities?

MR. CHRISTENSEN: Sure, that will be great.

THE COURT: And then could you say take 10 days or something in response?

MR. ANDREASEN: Certainly.

THE COURT: Okay.

MR. CHRISTENSEN: Could I just bring one other small matter to the Court's attention?

THE COURT: You bet.

MR. CHRISTENSEN: In terms of the bus travel of the children, there is a concern about a bus transfer being required and having the children being out in the middle of the night. If that is something that the Court is concerned about, could it be a one way trip without an exchange of buses if he is going to use ground transportation?

THE COURT: I think that would probably be in the best interests of everyone.

MR. ANDREASEN: We would certainly stipulate that the children need to be kept in a safe situation. As we understand the bus companies themselves will, in essence, do the same as the airlines and the bus driver will make sure that they are handed only to appropriate people or maintain their security if there is a stop or something along those lines. So, no question, we want to cooperate in that regard to make sure the children are safe.

THE COURT: Okay.

MR. CHRISTENSEN: I'm not exactly sure what that meant.

THE COURT: Well, I think what he is saying is that's not a problem, that they would agree.

MR. CHRISTENSEN: That a one way bus trip -

MR. ANDREASEN: It's always a one way bus trip --

THE COURT: Well, you know, so they don't have to transfer buses and that sort of thing.

MR. ANDREASEN: Subject to the bus company, as the airlines do, making sure they keep the children safe if they're alone.

THE COURT: Okay. Anything else?

MR. CHRISTENSEN: So, is the bottom line that the children can transfer and ride the bus so long as--

THE COURT: You know, I have some sympathy with idea that they wouldn't have to, obviously the bus is going to stop in various locations but -

MS. ROUNDY: There is a bus transfer on the trip to Bozeman, that's why I'm concerned.

THE COURT: Where do they transfer from?

MS. ROUNDY: I don't know but it's not a straight shot and they have to get on a different bus. And also, he wants the two youngest ones, the 10 and the 13 year old to travel without the older one on the bus and I don't want

that to happen. Those two children do not get along. They fight all the time and they could get themselves kicked off the bus somewhere along the route. And I'm very concerned with the safety of the children on the bus, especially when he has factored into his thing $500 for transportation for the kids. It doesn't cost that much more to fly them.

MR. ANDREASEN: Your Honor, may we contact the bus company and, I'm sure they have established procedures. We'll obtain those for your Honor and make sure that they are adequate for the protection of the children.

THE COURT: That's fair. Why don't you get whatever it is that you need to get and supply that to counsel?

MR. ANDREASEN: Sure.

MS. ROBERTSON: Can we stipulate that they all three have to be together if they go, not just the two youngest?

THE COURT: Well, but you see at the present time that would work fine but soon the oldest one, in another couple of years might not be available and the younger ones presumably will get a little older and a little more mature. So, it would be difficult to establish a rule now that's going to have application.

MS. ROUNDY: Well, I can't let my 13 year old and my 10 year old travel on that bus together by themselves.

THE COURT: Any I don't see any problem with that.

MS. ROUNDY: You don't know the kids. They can't even ride in a car together, they fight.

THE COURT: Hold on, hold on. They are not always going to be 13 and 10 and they are not always going to fight.

MS. ROBERTSON: Well, can we put an age when they turn 16 or 17 or something?

THE COURT: Well, why don't we take a look at what the bus company can do for us and then we'll consider that.

MR. CHRISTENSEN: I think her big concern is that the bus ride takes 12 hours.

MS. ROBERTSON: It takes 12 hours.

THE COURT: I know, I know. But kids are resilient. Anything else?

MR. ANDREASEN: No, your Honor.

THE COURT: Court's in recess.

(Whereupon the hearing was concluded.)

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearings held before Judge Stanton M. Taylor was transcribed by me from a video tape and is a partial transcription, as requested, of the hearing as set forth in the preceding pages to the best of my ability.

Signed this 27th day of December, 1998 in Sandy, Utah.

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2002